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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 298.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

NANCY J. GAY AND BESSIE GAY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED JULY 12, 1895.

(15,946.)

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1 *Caption.*

THE STATE OF TEXAS, }
County of Tarrant. }

At a term of the district court begun and holden within and for the county of Tarrant, at Fort Worth, on the 8th day of September, A. D. 1890, and which adjourned on the 10th day of January, A. D. 1891, before the Honorable R. E. Beckham, judge thereof, presiding, the following cause came on for trial, to wit:

NANCY J. GAY *et al.* }
vs. } 4384, 4384.
JOHN C. BROWN, Receiver, *et al.* }

(*Plaintiffs' Original Petition.*)

THE STATE OF TEXAS, }
County of Tarrant. }

In District Court, May Term, 1888.

To the honorable district court of said county:

The petition of Nancy J. Gay, who sues herein for herself and for her minor child, Bessie Gay, who will be hereinafter styled plaintiffs, complaining of John C. Brown, who is the receiver of the Texas and Pacific Railway Company (a railroad corporation duly incorporated), having been appointed such receiver by the United States circuit court at Dallas in a certain case pending in said court entitled The Missouri Pacific Railway Company *vs.* Texas & Pacific Railway Company, would show that plaintiff is a resident citizen of Tarrant county, and that the defendant Brown resides in the county of Dallas and State of Texas; that said defendant, as such receiver, is running and operation the said Texas and Pacific railway and was so engaged on, to wit, the 23rd day of January, 1888; that the line of said railway so run and operated by said defendant, Brown, extends into and through said Tarrant county, and also into and through Parker county, in the State of Texas, and that said defendant has an office and agency and a representative in the said county of Tarrant, the name of said agent being J. B. Bartholomew; that while said defendant, through his agents and servants, was so operating said railway, on, to wit, the 23rd day of January, 1888, in the said county of Parker, plaintiff's husband, John M. Gay, was in the employ of defendant
2 in the capacity of fireman on one of defendant's locomotive engines, which was then and there hauling a train of cars over said railway, and while said train was in motion and said John M. Gay in discharge of his duty in that regard said defendant's said engine and tender then and there, by reason of the defective condition of same and by reason of the defective coupling apparatus and machinery thereof, became uncoupled from the tender thereof, so that said John M. Gay was, by reason thereof and by

reason of the gross negligence of defendant in permitting said apparatus and machinery to become and remain in such condition and in allowing said decedent to use the same while ignorant of its said condition, thrown down and precipitated between said engine and tender without any fault on his part, and the tender and cars of said defendant then and there passed over and upon him and did then and there sever his head and one of his legs from his body and otherwise mangle him, thereby killing him instantly, to the damage of plaintiffs twenty-five thousand dollars.

That by reason of the said gross negligence and want of ordinary care on the part of said defendant in knowing and wilfully furnishing said John M. Gay unsafe, unsound, and unreliable apparatus and machinery as aforesaid plaintiff claims punitory damages in the sum of twenty-five thousand dollars; that by reason of the premises she sues and prays that said defendant be cited to answer this petition, and that upon a final hearing hereof she have judgment for herself and child aforesaid in the sum of said twenty-five — dollars actual damages and the further sum of twenty-five thousand dollars punitory damages, and she prays for costs and for general relief.

BALL, WYNNE & McCART,
Attorneys for Plaintiff.

Filed February 6th, 1888.

L. R. TAYLOR,
District Clerk.

(*Original Answer of Defendant John C. Brown.*)

In the District Court, Tarrant County, Texas.

NANCY J. GAY
vs. } 4384.
JNO. C. BROWN *et al.*

Now comes John C. Brown, receiver, defendant, by attorney, in above numbered and entitled cause, and for answer to plaintiffs' petition demurs thereto and says that the allegations thereof are insufficient in law, and of this he puts himself upon the country.

3 And for special demurrer defendant says that it appears by the allegations of plaintiffs' petition that this court has no jurisdiction either of the person of this defendant, either individually or as receiver, nor has it any jurisdiction of the subject-matter of this suit, and of this it prays the judgment of the court.

And, further answering, if so required, defendant denies all and singular the allegations in plaintiffs' petition contained, and of this he puts himself upon the country.

FINCH & THOMPSON,
Defendant's Attorneys.

Filed May 18th, 1888.

L. R. TAYLOR,
District Clerk.

(*Original Answer & Plea in Abatement of John C. Brown*)

In the District Court, Tarrant County, Texas.

NANCY J. GAY *et al.*
vs. } 4384.
JNO. C. BROWN, Rec'r.

Now comes John C. Brown, receiver, &c., defendant, by attorney, in above cause, and for plea to the jurisdiction of the court says that it appears by the allegations of plaintiffs' petition that he is the receiver of the T. & P. R'y Co., appointed by the United States circuit court, and that he resides in Dallas county, Texas; that none of the exceptions which allow a defendant to be sued out of the county of his residence, as provided for in art. 1198, R. S. Texas, exists appears affirmatively by the allegations in plaintiffs' petition.

That said petition also fails to show that this suit is maintained by permission of the court appointing this defendant receiver.

Wherefore defendant submits that this suit should be abated and dismissed on the ground that this court has not jurisdiction either of the person of the defendant or the subject-matter of this litigation.

FINCH & THOMPSON,
Attorneys for Def't John C. Brown, Rec'r.

Filed October 13th, 1888.

L. R. TAYLOR,
District Clerk.

4 (*Former Verdict and Judgment.*)

NANCY J. GAY *et al.*
vs. } 4384. Verdict for Plaintiffs, $10,000.00.
JNO. C. BROWN, Rec'r.

FEBRUARY 28TH, 1889.

Now, at this time, comes on the above-entitled cause, and, both parties having announced ready for trial, first came on to be heard the defendant's plea to the jurisdiction of the court herein, and, the arguments of counsel having been heard thereon and it appearing to the court that the law is against the defendant upon his said plea, and, further, that he has waived the same by failing to call the same up and ask a ruling of the court thereon at any previous term of court, and that said plea is not made in due order of pleading, it is ordered that the same be, and is hereby, overruled.

Thereupon came on to be heard plaintiffs' demurrer to that part of defendant's answer herein which sets up as matter of defense that the defendant has been discharged from the office of receiver of the Texas & Pacific Railroad Company and had turned over its funds and property to said railway, and that plaintiff- failed to intervene

as required by law, and, the parties having been heard on said demurrer, the court is of opinion that the law is for the plaintiffs thereon, and that said demurrer be sustained; and, the defendant having refused to amend said pleading, the same is dismissed and for naught held; whereupon the cause proceeded to trial upon its merits; and then came a jury of good and lawful men, to wit, J. A. Ball and eleven others, who, after being duly impaneled and sworn, proceeded to hear the evidence, arguments of counsel, and receiving the charge of the court, and, after having retired to consider of their verdict, brought into open court the following verdict, to wit:

"We, the jury, find for the plaintiffs in the sum of ten thousand dollars—four thousand for Nancy J. Gay and six thousand to Bessie Gay.

"J. A. BALL, *Foreman.*"

It is therefore considered and adjudged by the court that the foregoing verdict be in all things approved and confirmed, and that the plaintiff Nancy J. Gay, for herself and as next friend to her minor child, Bessie Gay, do have and recover of and from the defendant John C. Brown, receiver of the Texas and Pacific
5 Railway Company, the sum of ten thousand dollars, four thousand of which she shall be entitled to in her own right, and six thousand dollars of which said amount she shall be entitled to as next friend to her said minor child and to be held for the benefit of said minor, and that said plaintiffs recover of said defendant, as receiver as aforesaid, all costs herein expended, and that this judgment bear interest at the rate of eight per cent. per annum, for which execution will issue. Further ordered that execution issue against each party, respectively, for the costs by them herein incurred.

(*Plaintiffs' Amended Supplemental Petition.*)

NANCY J. GAY *et al.* vs. JOHN C. BROWN *et al.* } 4384. Suit Pending in the District Court of Tarrant County.

Now comes plaintiffs in the above-entitled cause, and by leave of the court file this their first amended supplemental petition, — by way of reply to defendant's amended original answer filed herein February 25th, 1889, say:

First. Plaintiffs demur to said answer and to each and every plea therein contained and say that the same is wholly insufficient; whereof plaintiffs pray judgment on each plea separately.

Second. Specially answering defendant's plea to the jurisdiction in said answer contained, plaintiffs say that defendant Brown has waived his right to make such plea, for that heretofore, to wit, on the 18th day of May, 1888, and before filing said plea, said Brown did make and file in this cause his certain answer to the merits of this cause. Plaintiffs here refer to said answer and pray that the

same be taken, read, and considered as part of this petition; all which they are ready to verify.

Third. Further answering herein, plaintiffs say that the said Texas and Pacific Railway Company, the corporation mentioned in defendant Brown's said answer and for which he is therein alleged to have been acting as receiver, is liable to plaintiffs for the damages claimed in plaintiffs' original petition herein, and that plaintiffs ought to recover judgment against said corporation, for

6 that plaintiffs aver, 1st, that said suit mentioned in defendant's answer was collusively brought, and that defendant Brown, while acting ostensively as receiver herein, was in fact during the whole of his term of office but the agent of the said Texas & Pacific Railway Company, and was acting for it and on its behalf during the time he operated said road, and that said corporation was the undisclosed principal of said Brown in the control and operation of said railroad; 2nd, that at and before the time of the discharge of said Brown as receiver in said cause the said Texas and Pacific Railway Company bound and obligated itself in writing to assume and pay off all liabilities incurred by said Brown as receiver as aforesaid; 3rd, that during the said receivership said Brown as receiver, out of the current receipts derived from the operation of said road, made permanent improvements and betterments on said road to the amount and value of, to wit, two million dollars of the said railroad of said Texas & Pacific Railway Company was received by it from said Brown was increased in value to that extent.

Plaintiffs aver that said railroad company was an agent and a representative in this (Tarrant) county, the name of said agent being J. T. Clements.

Wherefore plaintiffs pray that said Texas & Pacific Railway Company be made a party to this suit, and that it be cited to appear and answer herein, and that upon final hearing that plaintiffs have judgment against said company for the amount claimed in plaintiffs' petition, and for general relief.

BALL, WYNNE & McCART,
Attorneys for Plaintiffs.

Filed April 24th, 1890.

L. R. TAYLOR,
District Clerk.

(*Original Answer of T. & P. R'y Co.*)

In District Court, Tarrant County.

NANCY J. GAY *et al.*
vs.
JNO. C. BROWN, Rec'r, & T. & P. R'Y CO.

Now comes the defendant The Texas & Pacific Railway Company, by attorney, and for answer to plaintiffs' petition de-

7 murs thereto and says the allegations therein contained are insufficient at law to maintain this suit.

And for further answer, if required, denies all and singular the allegations in plaintiffs' petition contained; and of this it puts itself upon the country.

FINCH & THOMPSON,
Attorneys for Defendant.

Filed November 18th, 1890.

L. R. TAYLOR,
District Clerk.

(*1st Amended Original Answer T. & P. R'y Co.*)

In the District Court, Tarrant County, Texas.

NANCY J. GAY *et al.*
vs.
JNO. C. BROWN, Rec'r, & T. & P. R'Y CO. } 4384.

Now comes The Texas & Pacific Railway Company, defendant, by attorney, and, leave of the court being first had and obtained makes and files this its first amended original answer in lieu of its original answer filed herein on the 18th day of November, 1890, and for amendment says:

1st. It demurs to the allegations in plaintiffs' petitions and says that the same are insufficient in law to hold or bind this defendant.

2nd. Defendant specially demurs to plaintiffs' attempt by supplemental petition to hold or bind this defendant, because it was not a party to the original petition filed herein, which was never amended, and because said supplement is filed in reply to the amended answer of Jno. C. Brown, rec'r, who has been discharged since filing the same and more recently has died, and this suit as to him has abated.

3rd. Defendant further *further* excepts to the sufficiency of plaintiffs' petition because it appears by the allegations thereof that more than one year and more than two years had elapsed after the cause of action herein declared upon had accrued before this defendant was served and made a party to this suit.

4th. It further specially excepts to the sufficiency of said petition, because it appears therefrom that John C. Brown, receiver,
8 was liable for the tort complained of, but it does not appear that when he was discharged the court made no provisions for the payment of plaintiffs' claim in the order of final discharge, and specially does defendant except to the sufficiency of the 13th paragraph of plaintiffs' second supplemental petition upon this point.

5th. It speciall- excepts to all the allegations in said 2nd amended supplemental petition which attempt to fix liability upon this defendant for the acts of Jno. C. Brown, because they constitute a departure in pleading from the cause of action set out in plaintiffs' original petition herein.

6th. It further excepts to said petition because the allegations thereof down and including the 13th paragraph thereof and constituting the 1st count in said petition are at variance with and

contradict the remaining paragraphs of said petition down to the 23rd paragraph, which compose the 2nd count thereof.

7th. It further excepts to said petition, and especially the 24th paragraph thereof, because plaintiff ought not to be allowed to contradict and deny the employment of her husband by Jno. C. Brown as receiver, more particularly when the petition on its face alleges the fact and then attempts to evade it.

8th. It specially excepts to that part of the prayer which asks that a lien be declared on the property of defendant.

9th. It further specially excepts to the sufficiency of said petition wherein it attempts to hold this defendant liable for the acts of Jno. C. Brown, rec'r, as set forth in paragraph- 1st and 3rd on the last page thereof and the allegations in support thereof, because they are an attempt to hold this defendant liable for an equitable demand based upon an unliquidated demand against Jno. C. Brown, receiver, which has never been reduced to judgment.

10th. It specially excepts to the sufficiency of said petition, because this suit was instituted under the act of Congress allowing receivers of the United States courts to be sued without permission of the court appointing the receiver, while said act specially provides that such suits shall be maintained subject to the equity jurisdiction of the court appointing the receiver; but plaintiff, in terms and in effect, denies the power and jurisdiction of said court in the premises.

9 And of the sufficiency of said petition and of its several paragraphs indicated defendant prays the judgment of the court.

11th. And, further answering, should its demurrers be overruled defendant denies all and singular the allegations in plaintiffs' petition contained, and says that it is not guilty of said alleged wrongs, injuries, and trespasses, as plaintiff hath alleged; and of this it puts itself upon the country.

12th. And for further answer defendant says that plaintiff ought not to have or maintain this action because it says that more than one year and more than two years had elapsed after the accrual of the cause of action declared upon before this suit was filed against defendant and before it was made a party defendant herein.

13th. For further special answer defendant says that it was provided in the order finally discharging said receiver that the bills in the cause wherein the receiver had been appointed should be retained by said court appointing said receiver for the purpose of investigating the liabilities and responsibilities of said receiver, and that all judgments then rendered or that should thereafter be rendered and their existence brought to the attention of said court by intervention would be provided for, even to the extent to declaring them a lien upon the property of this defendant. Said order is hereto attached, marked Exhibit "A;" and all this defendant is ready to verify. Wherefore it submits that plaintiff did not stand without a remedy in said court appointing said receiver, and this defendant ought not to — liable in this suit.

FINCH & THOMPSON,
Attorneys for Def't T. & P. R'y Co.

14th. And for further special answer defendant says that if injured at all, as alleged, then defendant says that plaintiff's husband's said injuries were caused and occasioned by his own contributory negligence in going upon said engine when he knew or must have known of the alleged defect from its patent character and in remaining as-ride if the opening between said engine and tender after the pin rose up in plain view, and in failing to push to drive it back in its place; all of which he assumed as a risk incident to his employment; and this defendant is ready to verify.

FINCH & THOMPSON,
Attorneys for Defendant.

Filed November 25th, 1888.

L. R. TAYLOR,
District Clerk.

(Second Amended Supplemental Petition.)

NANCY J. GAY *et al.* *vs.* JOHN C. BROWN *et al.* } 4384. Suit Pending in District Court of Tarrant County, Texas.

Now come plaintiffs in the above-entitled cause and, by leave of court, file this their second amended supplemental petition in lieu of and as a substitute for their first supplemental petition filed herein April 24th, 1890, and by way of reply to defendants' first amended original answer filed herein February 25th, 1889, and say:

First. Plaintiffs demur to said answer and each and every plea therein contained, and say that the same is wholly insufficient; whereof they pray judgment on each plea separately.

Second. Specially demurring to defendants' plea of privilege, plaintiffs say that defendant herein had waived his right to make such plea long before the filing thereof, for that on, to wit, the 15th day of May, 1888, said defendant made and filed in this cause his certain answer to the merits thereof; which said answer plaintiffs here refer to and pray that it may be taken, read, and considered as part hereof.

Third. Further replying to said amended original answer and by way of supplementary amendment to their original petition herein, plaintiffs say that the Texas and Pacific Railway Company, the corporation mentioned in defendant Brow-'s said answer, and for which he is therein alleged to have been acting as receiver at the time therein mentioned, is liable to plaintiffs, and plaintiffs ought to recover from said corporation the damages claimed by them in their original petition herein on their said cause of action as set forth therein, for that, 1, that heretofore, to wit, on the 15th day of December, 1885, the said defendant, Texas and Pacific Railway Company, was and for a long time prior thereto had been the owner of a certain line of railroad extending through and into various counties in the State of Texas and Louisiana, specially in said Tarrant county, and was then and there engaged in the

business of operating and conducting the same as a common carrier of freight and passengers for the public for hire.

2. That said defendant then and there owned large bodies of real estate in said State of Texas, inclusive and exclusive of its right of way, and large quantities of personal property, consisting of the rolling stock and other personal property, and money, choses in action, and — used in the conduct of its said business, of the aggregate value of, to wit, twenty million dollars.

3. That on said last-named day the Missouri Pacific Railway Company, then and there alleging that it was a corporation incorporated under the laws of the State of Missouri and a citizen of said State, filed its certain bill of complaint against the defendant Texas and Pacific Railway Company in the circuit court in and for the fifth circuit and eastern district of Louisiana (being the action referred to in defendants' pleading), wherein the complainant set up and alleged certain matters concerning the financial condition of said Texas and Pacific Railway Company, and thereupon prayed that said court appoint a receiver to take into his possession and control all the property, real and personal, both franchises and premises, of every description whatsoever, of said defendant company, and to manage, operate, and maintain the lines of said defendant company, "with authority to employ such agents and servants as might be necessary to preserve the property of the defendant company, and keep it open as a public highway for the transportation and carriage of passengers and freight by steam power, as aforesaid, and for the proper performance of and discharge of its business as a railway company."

4. That on said last-named day and simultaneously with the filing of said bill of complaint said defendant, Texas and Pacific Railway Company, filed in said court its certain answer to said bill of complaint, wherein it substantially admitted all the allegations contained in said bill of complaint, and substantially con-
12 sented to the appointment of a receiver as prayed for in said bill.

5. That on the next day thereafter, to wit, on the 16th day of December, 1885, the application and prayer of said plaintiff in said bill contained, and for the appointment of a receiver, as aforesaid, was heard by the Hon. Don A. Pardee, judge of said circuit, in said State of Louisiana, who thereupon granted said application in manner and form as prayed for in said bill, and then and there appointed the defendant John C. Brown and one Lional A. Sheldon receivers of all the railroads of said defendant company, then and there clothing them with such powers and authority as *was* prayed for in said bill.

6. That immediately thereupon said Brown and Sheldon took possession of all and singular the rights, property, franchises, books, papers, choses in action of every description whatsoever belong- to said defendant company, and proceeded to employ the necessary agents and servants and operate and run all said lines of railroad in said State- of Louisiana and Texas, and carry on said business of common carrier of freight and passengers therewith, acting under

and by virtue of said order of appointment until, to wit, the 30th day of November, 1887, when, said Sheldon having resigned said office of receiver, the said circuit judge, on said last-named day, made an order whereby all the powers theretofore conferred upon the two receivers jointly were conferred on and vested in the defendant Brown as the remaining and sole receiver, after which date the said defendant, Brown, continued to run and operate said lines on — railroad as sole receiver until he was discharged from said office, as will be hereinafter more fully set forth.

7. That on, to wit, the 4th day of May, 1888, all parties litigant, both plaintiffs and defendants, in said suit of Missouri Pacific Railway Company *vs.* Texas & Pacific Railway Company, pending as aforesaid, wherein said defendant, Brown, had been appointed as receiver as aforesaid, made and entered into a certain agreement, in writing, whereby it was agreed between them that after the costs had been paid or provided for and the receiver had made his settlement with the court he should be discharged and the causes dismissed, it being stated in said written agreement that the said Missouri Pacific Railway Company had received pay in full for its demands against said Texas and Pacific Railway Company claimed by its original bill in said suit.

13 And it was therein agreed further that thereupon the property in the hands of the receiver (defendant Brown) should be transferred to the Texas and Pacific Railway Company under its present organization, which said company, defendant herein, therein and thereby undertook and agreed to protect the defendant Brown against any unsettled contracts, liabilities, costs, and suits arising under and because of the receivership.

8. That afterwards, to wit, on the 26th day of October, 1888, said defendant, Brown, as receiver as aforesaid, filed in said suit his certain petition for a final discharge, stating therein in substance that the objects and purposes of the bills in these causes (thereby meaning the original bill of The Missouri Pacific Railway Company *vs.* Texas and Pacific Railway Company and certain other bills brought by mortgage bondholders which had been consolidated therewith) had been accomplished by settlement and agreement of the parties, and that evidence of said fact had been filed as part of the record, and that he, the said defendant, Brown, was now (at the date of the filing of said petition) the president of said Texas and Pacific Railway Company, and would, after his discharge, be in possession of all said company's road, property, and funds as such for said company, and praying to be discharged from his said receivership, and that his bond as receiver*ship* be vacated and annulled on payment of all costs legally taxable, and that the court make such order as would charge the property so turned over, in the hands of said railway company and its assigns, for all liability for which he as receiver is or might be held personally liable, stating further therein that the sum of his compensation as receiver had been agreed on by the parties in interest and was satisfactory to him and had been settled up to the thirty-first day of October, 1888, at which time he asked that his discharge take effect.

9. That on said last-named day, upon the filing of said petition for discharge, the said circuit judge made and entered a certain order in said consolidated cases whereby and wherein it was ordered, adjudged, and decreed that the prayer of said petition be granted, and accordingly that said receiver, defendant Brown, should deliver to said defendant, Texas & Pacific Railway Company, all
14 property, funds, and assets in his hands as such receiver as of October 31st, 1888, and *the* he be finally discharged on said last-named day on payment of all costs legally taxed, and that thereupon his bond be vacated and cancelled, but that said property should be delivered to and received by said railway company, subject to and charged with all traffic liabilities due to connecting lines and all contracts for which said receiver was (at the date of said order) or might be held, made, or in any way liable.

10. For more particularity, plaintiff will before the trial hereof file herein duly certified copies of said bill in equity, order of appointment of Receivers Brown and Sheldon, decree confirming appointment of receivers, order accepting resignation of Sheldon and appointing Brown sole receiver, answer of defendant, agreement for discharge of receiver, order on petition of receiver for discharge, petition for final discharge, all of said instruments being contained in one transcript, which will be marked "Exhibit A," and which, when so filed, plaintiff will ask to be taken as part hereof.

11. That thereafter, to wit, on the 31st day of October, 1888, said defendant, Brown, in obedience to said order, transferred all and singular the railway lines, property, choses in action, moneys, and assets of every description which he had theretofore held as receiver, of the value of, to wit, twenty-five million dollars, to said defendant, Texas & Pacific Railway Company, and the said defendant railway company *have* ever since said date been and is now in possession thereof and operating the same as a common carrier of freight and passengers as aforesaid.

12. That during the time said Brown and Sheldon, as joint receivers, and said Brown, as sole receiver, were in possession of said property and operating the same as aforesaid, they did, under the order of said circuit court, make divers and sundry improvements and betterments upon the property of the said defendant corporation, and did also purchase large quantities of rolling stock and machinery for said railroad, which was paid for out of the current receipts thereof, whereby the property of said defendant corporation has been increased to the value of five million of dollars.

13. That, as will be seen from the premises, this action of
15 plaintiffs was pending and undetermined in this honorable court at the time of the discharge of defendant Brown from his office as receiver as aforesaid; yet plaintiffs aver that although both said defendants had full knowledge thereof and of all and singular the premises, yet they wholly failed, neglected, and refused either to provide for the contingency of a judgment against said Brown in this cause at the time of his discharge by retaining in his, said Brown's, hands sufficient money to satisfy same or otherwise, or to pay the same or any part thereof, although, as before

stated, there was at the time of the discharge of said defendant as receiver as aforesaid an ample sufficiency of both money and property to satisfy and pay the plaintiffs' damages in his hands, and although the said defendant railway company is still in possession of said money and property, to their damage in the sum of fifty thousand dollars.

14. Plaintiff further shows that said Texas and Pacific Railway Company, on said 15th day of December, 1885, formed a part of and was incorporated into what was known as "the Missouri Pacific railway system"—that is to say, that certain persons, to wit, Jay Gould and others, who then and there owned and controlled a majority of the shares of the capital stock and constituted a majority of the board of directors of the Missouri Pacific Railway Company (a railroad corporation incorporated under the laws of the State of Missouri), had also acquired by means best known to themselves a majority of the shares of the capital stock in divers and sundry other railroad corporations, and especially that of the defendant Texas & Pacific Railway Company, incorporated under the laws of the State of Missouri, Arkansas, Louisiana, Nebraska, and Texas, respectively, and whose lines of railroad extended through and into said States, and had caused themselves and their agents and servants to be appointed and elected as directors and officers of said respective railroad corporations, and thereby acquired complete control thereof, and had united and consolidated said various lines of railroad, under one management all of them, and the officers and directors thereof being subordinate and subservient to Jay Gould, who was then and there president of the Missouri Pacific Railway Company, and that said Texas & Pacific Railway Company was then and there one of said corporations so controlled and operated as a part of said Missouri Pacific railway system
16 as aforesaid by said Jay Gould and said other persons, who were then and there known as the "Gould syndicate," said Jay Gould being then and there president, and said defendant, Brown, being then and there one of the vice-presidents, and both being directors thereof.

15. That on said last-named day the said Jay Gould, and the said "Gould syndicate," and the said Missouri Pacific Railway Company, and the said defendant, Texas & Pacific Railway Company, and the said defendant, John C. Brown, colluding and conspiring together for the purpose of placing said road in repair at the expense of its creditors, the said syndicate having purposely allowed it to get in bad condition and out of repair, and for the purpose of compelling the creditors of said Texas and Pacific Railway Company to compromise and scale their debts, and for the purpose of preventing and retarding persons who had claims and demands against said last-named corporation from bringing and prosecuting their actions therefor, and for the purpose of the more complete absorption on the part of the said Gould syndicate of the property and assets of said corporation, caused and procured the filing of said bill in equity and bringing of said suit in said United States circuit court in manner and form as aforesaid, then and there causing it to be alleged and pre-

tended in said bill in substance that said Texas & Pacific Railway Company was indebted to said Missouri Pacific Company in a large amount of money for loans and advances made by said plaintiff therein to said defendant therein, and that said defendant therein had requested said loans and had promised to pay same and had failed to do so, and that said defendant road was in bad condition and needed large sums of money to place it in repair, and that unless restrained by writ of injunction and appointment of receiver all the resources of said road would be appropriated by its officers to pay interest on its mortgage bonds, and finally prayed in substance for the appointment of a receiver to operate said road, and the *inst*ance of a writ of injunction restraining the said Texas and Pacific Railway Company, its agents, servants, and employés, and all persons or corporations claiming under or through said corporation, from obstructing or in any manner interfering with said receiver in possession of said railroad and the property of said company.

16. That all of the material allegations in said bill con-
17 tained were essentially fraudulent and essentially false, in this: that if said plaintiff therein had advanced or loaned any money to said defendant therein, it was not done upon any request or promise to repay on the part of said defendant, but, on the contrary, the said Gould and his associates, then and there being in full control of plaintiff an*f* def't corporations and the finances and books thereof, had at their own pleasure and volition ostensibly transferred the moneys of each of said roads respectively to the other, in such manner that while there might have been an apparent indebtedness there would not have been at law or in equity any real obligation between them, by reason of the identity of the directors, stockholders, and officers thereof, as aforesaid, and for the further reason that the condition of the road as to being out of repair had been brought about by plaintiff itself by and through said syndicate, and for the further reason that the anticipated actions and payments on — part of said officers of said defendant road, which plaintiff then and there sought to restrain by injunction, *was* or would be but the action- of plaintiff itself, acting by and through said syndicate; and for the further and final reason that it was then and there intended, and had theretofore been agreed upon between said conspirators, that said defendant, Brown, who was then and there an officer and director of said defendant railroad, should be, if possible, procured to be appointed a receiver thereof, so that said railroad should continue to be operated under the direction and in the interest of said plaintiff and said syndicate, and should continue to be a tributary of said Missouri Pacific railway system, and while its status as to its creditors and the public would be altered by reason of the appointment of said receivers, in so far as its relation to its directors and officers and to said plaintiff and to said syndicate were concerned, should remain unchanged.

17th. That, in pursuance of said conspiracy and *con*clusive agreement, said parties plaintiff and said syndicate and the defendant herein caused and procured, by means of further apparently fair,

but in reality collusive agreements and negotiations between themselves, the said circuit judge (unwittingly and without the knowledge of the said honorable judge, who was then and there unaware of the premises) to appoint the said defendant, Brown, as one of the receivers of said railroad, and afterward the sole receiver thereof, as aforesaid.

18 18. That although said defendant, Brown, pretended to resign his said office of vice-president of said defendant company at the time he was appointed receiver as aforesaid, his real connection with the said defendant remained unchanged, and, further, that during the whole of the time he held said office of receiver, both jointly and solely, and management of said road by and its connection with and subordination to the said Missouri Pacific Railway Company and said Gould syndicate was kept intact and unchanged, and while the said Brown was ostensibly the receiver and officer of said court he was during the whole of said time and at the time of the death of the said John M. Gay in truth and in fact but the agent and servant of said defendant, Texas & Pacific Railway Company, and the said Missouri Pacific Railway Company and said Gould syndicate and was managing, controlling, and operating said railroad and employing servants therefor, on their behalf, and for their use and benefit.

19. That on, to wit, said 4th day of May, 1888, said plaintiff and the defendant in said suit made and entered into the written agreement for the dismissal of said cause and the discharge of said receiver as aforesaid, which plaintiffs here aver was made in pursuance and as the consummation of said collusive agreement and conspiracy, the purpose thereof having been — and there practically accomplished.

20. That afterward, to wit, on said 27th day of October, 1888, said defendant, Brown, filed and presented his petition for discharge as aforesaid, and that on the same day said judge entered the order of discharge as aforesaid.

21. That said Brown, in obedience to said order, delivered said property and assets to said defendant company as aforesaid, but plaintiff here avers that said delivery at said time was only a sham and pretense, for that said company had in reality been in full possession and control of all its said property during the whole of the time of said receivership as aforesaid.

22. That during the time that said receivers were in the legal and ostensible possession and control of said property as aforesaid they did, under the order of said court as aforesaid, make the betterments, purchases, and improvements for and on said railroad as aforesaid, of the value as aforesaid.

19 23. That on said 23rd day of January, 1888, while the said Brown was in the ostensible possession of said railroad as receiver as aforesaid, he contracted with and employed said John M. Gay (who was then and there ignorant and had no notice of said collusive suit and agreements hereinbefore mentioned) as fireman as aforesaid for and on behalf of his said company, the defendant Texas & Pacific Railway Company, and the said defendant, Brown,

and said defendant railway company did, by reason of their said wilful and gross negligence and dereliction as aforesaid, cause the death — the said John M. Gay as aforesaid, to the damage of plaintiffs as aforesaid.

24. That thereafter, to wit, on the 6th day of February, 1888, these plaintiffs (being then and there wholly ignorant of said collusive agreement and conspiracies on the part of said defendant and said Missouri Pacific Railway Company and said Gould syndicate, as aforesaid, the same having been concealed from them by defendants, and not having been discovered by them until, to wit, ten days before the filing of this petition) brought this action against John C. Brown, as receiver as aforesaid.

25. That this suit has been defended by the defendant railway company and its attorneys, and said railway company had full notice and knowledge of all and singular the premises during the whole of said time said litigation was pending — has been pending, but fraudulently concealed from these plaintiffs that it was the real party in interest, and that it was conducting the defense of said Brown in said suit, as aforesaid, and that said defendants have wholly failed and refused to pay plaintiffs their said damages or to provide in any manner for the payment of same, as aforesaid.

26. That said Gould and said syndicate and said Missouri Pacific Railway Company are non-residents of this State and are without the jurisdiction of this hon. court.

27. Plaintiffs say that said defendant, Texas and Pacific Railway Company, are liable to them for their damages herein:

1st. Because said Brown was but the agent and servant of said company during the whole of the time he acted as receiver as aforesaid, and said company was his undisclosed principal as aforesaid.

2nd. By reason of the written agreement whereby said company assumed the payment of all the liabilities incurred by said Brown during the time he acted as receiver as aforesaid; and

3rd. Because of the improvements and betterments made upon said road out of the current receipts thereof, as aforesaid, and they therefore pray for judgment against said defendant, Texas and Pacific Railway Company, for their said damages, and that said judgment be declared a lien upon all and singular the property, real and personal, of said defendant railway company, and especially upon such of the property, improvements, and betterments as have been added thereto by said receivers during their term of office, and for such other and further relief, both general and special, as they may be entitled to under the rules of law or equity, as in duty bound, etc.

BALL & BALL, WYNNE & McCART,
Attorneys for Plaintiffs.

Filed May 17th, 1890.

L. R. TAYLOR,
District Clerk.

(Second Amended Original Answer of Defendant Texas & Pacific R'y Co.)

In the District Court of Tarrant County, Texas.

NANCY J. GAY *et al.* *vs.* JOHN C. BROWN, Receiver, & TEXAS & PACIFIC RAILWAY CO.	4384, 4384.

Now comes The Texas and Pacific Railway Company, defendant, by attorneys, and, leave of the court being first had and obtained, makes and files this its second original answer in lieu of its original answer filed herein on the 18th day of November, 1890, and its first amended original answer filed on November 25th, 1890, and for amendment says:

1. It demurs to the allegations in plaintiffs' petition contained, and says that the same are insufficient in law to hold and bind this defendant; and of this it prays judgment of the court.

2. It specially excepts to the sufficiency of the allegations of negligence because it is not charged that this defendant or said Brown, receiver, knew of the defect complained of, or by the exercise of ordinary diligence could have detected the said defect.

3. It specially excepts to the claim of punitory damages because there are no sufficient allegations to uphold said claim.

4. It specially excepts to the plaintiffs' attempt by supple-
21 mental petition to hold or bind this defendant because it was not a party to the original petition filed herein, which was never amended, and because said supplement was filed in reply to an amended answer of John C. Brown, receiver, who has been discharged since the filing of the same, and more recently has died, and this suit as to him has abated, and said supplement is not in answer to anything which has been pleaded by this defendant.

5. This defendant further excepts to the sufficiency of the plaintiffs' petition because it appears by the allegations thereof that more then one and more than two years had elapsed after the cause of action herein declared upon had accrued before this defendant was sued and made a party to this case.

6. Defendant further specially excepts to the sufficiency of said petition because it appears therefrom that John C. Brown, receiver, was liable for the tort complained of, and it does not appear that when he was discharged he made no provision for the payment of plaintiffs' claim in the order of final discharge; and specially does this defendant except to the sufficiency of the 13th paragraph of plaintiffs' second supplemental petition upon this point.

7. Defendant specially excepts to all the allegations in said second amended supplemental petition which attempts to foist liability upon this defendant for the acts of John C. Brown, receiver, because they constitute a departure in pleading from the cause of action set out in plaintiffs' original petition in this case.

8. Defendant further specially excepts to said petition because the allegations thereof down to and including the 13th paragraph thereof, constituting the first count in said petition, are at variance with and contradictory of the remaining paragraphs of said petition down to the 23rd paragraph, which constitute the second count thereof.

9. This defendant further excepts to said petition, and especially the 24th paragraph thereof, because plaintiff ought not to be allowed to contradict and deny the employment of her husband by John C. Brown as receiver, more particularly when her petition on its face alleges this fact and then attempts to evade it.

10. Defendant further specially excepts to that part of the prayer which asks that a lien be declared on the property of the defendant.

22 11. Defendant further excepts to the sufficiency of said petition wherein it attempts to hold this defendant liable for the acts of John C. Brown, receiver, as set forth in paragraphs first and third on the last page thereof and the allegations in support thereof, because it is an attempt to hold this defendant liable for an equitable demand based upon an unliquidated demand against John C. Brown, receiver, which has never been reduced to judgment.

12. This defendant specially excepts to the sufficiency of said petition because this suit was instituted under an act of Congress allowing receivers in the United States courts to be sued without permission of the court appointing the receiver, while said act specially provides that such suit shall be maintained subject to the equity jurisdiction of the court appointing the receiver; but plaintiff in terms and in effect denies the power and jurisdiction of said court in the premises; and of the sufficiency of said petition and of the several paragraphs indicated above this defendant prays judgment of the court.

FINCH & THOMPSON,
Attorneys for said Defendant.

13. And, further answering in this behalf, should its demurrers be overruled, this defendant denies all and singular the allegations in plaintiffs' said petition contained, and says that it is not guilty of the alleged wrongs, injuries, and trespasses that plaintiff hath urged against it, and of this defendant puts itself upon the country.

FINCH & THOMPSON,
Attorneys for said Defendant.

14. And for special answer this defendant says that plaintiff ought not to have and maintain this action, because it says that more than one year and more than two years had elapsed after the accrual of the cause of action declared upon before this suit was filed against this defendant and before it was made a party thereto.

15. And, further specially answering, this defendant says that if injured at all as alleged, then defendant charges that plaintiff's husband's said injuries were caused and occasioned by his own con-

tributory negligence in getting upon said engine when he knew or must have known of the alleged defects complained of from their patent character, and also in standing upon said engine
23 astride of the opening or apron between the engine and tank after the pin raised up in plain view, and also in failing to push or drive said pin back into its place after he knew or ought to have known that it had arisen out of its place.

16. And for further special answer this defendant says that it was guilty of no negligence in the premises, because it had furnished a safe engine for the use of its servants, including plaintiff's husband, and if it was lacking in anything or if the pin had no slot or key, as alleged, then defendants says that the failure to supply said engine with a slot or key or to properly adjust the coupling apparatus was the act or failure of a fellow-servant of plaintiff's husband.

17. Defendant further says that it was guilty of no negligence in the matter of furnishing and keeping in repair the engine and coupling apparatus complained of; that the defect, if any, in said engine and coupling apparatus was unknown to this defendant, and by the use of ordinary diligence could not have been known to it, and that whatever defect may have existed and is complained of by plaintiff was included in the risks incident to the employment of plaintiff's husband, which he of necessity must assume and did assume.

18. And, further specially answering, this defendant says that it was provided in the order finally discharging the said receiver that the bills in the causes wherein the receiver had been appointed should be retained by said United States court appointing said receiver for the purpose of investigating the liabilities and responsibilities of said receiver, and that all judgments then rendered or that should thereafter be rendered and their existence brought to the attention of said court by intervention would be provided for to the extent of declaring them a lien upon the property of this defendant. Said order is hereto attached, marked Exhibit A. And all this the defendant is ready to verify.

FINCH & THOMPSON,
Attorneys for Defendant.

24 EXHIBIT "A."

In the United States Circuit Court.

THE MISSOURI PACIFIC RAILWAY COMPANY *versus* THE TEXAS & PACIFIC RAILWAY COMPANY.	No. 11181. Eastern Dist. of La.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY *versus* THE TEXAS AND PACIFIC RAILWAY COMPANY.	Eastern Dist. of La.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY *versus* THE TEXAS AND PACIFIC RAILWAY COMPANY.	Eastern Dist. of La.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY *versus* THE TEXAS AND PACIFIC RAILWAY COMPANY.	North. Dist. of Tex., at Dallas.
GEO. D. KRUMBHAAR and SAM'L M. FELTON, Trustees, etc., *versus* THE TEXAS AND PACIFIC RAILWAY COMPANY.	North. Dist. of Tex., at Dallas.

To the honorable the judges of the said circuit court:

Your petitioner, John C. Brown, as receiver of the Texas and Pacific railway and its property in the above entitled and numbered causes, represents that heretofore it has been made to appear to the court that the objects and purposes of all the bills in these causes have been accomplished by settlement and agreement of the parties and evidence of that fact filed as part of the record.

That, on it being so made to appear, the court ordered him to render his accounts as receiver up to the first of June, which has been done, and it has been examined and approved, and since that date petitioner has kept his account as with the company.

25 By the same order he was directed to hold the property under the orders of the court until the first of June, 1888, at which time, if said order was not vacated, the railway company might operate the road under such orders as the court might make from time to time and under the supervision and control of the receiver. No formal delivery of the road and property in his hands has been made to said railway company, and petitioner now asks that he be allowed formally to deliver all property and funds in his hands as such receiver to said railway company, and that he be allowed to account to said company according to his account filed up to the first of June, and for all receipts and expenditures by him received and made since the first of June.

He has carried over on the present books of the company the cash balance and all other balances of property and assets as found in his hands by his report to the first of June aforesaid, and he is now the president of said railway company, and after his discharge will be in possession of all said company's road, property, and funds as such for said company; wherefore he asks that he be discharged from his said receivership, and that his bond as receiver be vacated and annulled on payment of all costs legally taxable. But he prays the court to make such order as will charge the property so turned over in the hands of said railway company and its assigns with all liability for which he as receiver is or might be held personally liable.

Your petitioner further says that the sum of his compensation as receiver has been agreed on by the parties in interest, and is satisfactory to him, and has been settled up to the thirty-first day of October, 1883, at which time he asks that his discharge take effect.

(Signed) JOHN C. BROWN.

Order on Petition of John C. Brown, Receiver, for Discharge.

THE MISSOURI PACIFIC RAILWAY COMPANY
versus
THE TEXAS AND PACIFIC RAILWAY COMPANY. } No. 11181.

On consideration of the foregoing petition it is now ordered, adjudged, and decreed that the prayer of the same be granted, and accordingly that John C. Brown, receiver of the property of the Texas and Pacific Railway Company in the above-entitled
26 causes, be, and is hereby, directed to make delivery unto said Texas and Pacific Railway Company of all property, funds, and assets in his hands as such receiver, and that he be directed to account to said company according to his account filed and approved up to June 1st, 1888, and for all receipts and expenditures by him received and made since the said 1st June, 1888. Such delivery will be made as of October 31st, 1888.

It is further ordered that said receiver be finally discharged on said 31st October, 1888, from his receivership on payment of all costs legally taxed, and that thereupon his bond be vacated and cancelled.

It is further ordered that said property nevertheless shall be delivered to and received by said Texas and Pacific Railway Company subject to and charged with all traffic liabilities due to connecting lines, and all contracts for which said receiver is or might be held, made, or in any way liable, and subject also to any and all judgments which have heretofore been rendered in favor of intervenors in this case and which have not been paid, as well as to such judgments as may be hereafter rendered by the court in favor of intervenors while it retains the cases for these determinations on interventions now pending and undetermined or which may be filed prior to February, 1889, together with needful expenses of defending said claims, and upon the condition that such liabilities and

obligations of the receiver when so recognized and adjudged may be enforced against property in the hands of said company or its assigns to the same extent they could have been enforced if said property had not been surrendered into the possession of said company and was still in the hands of the court, and with the further condition that the court may, if needful for the protection of the receiver's obligations and liabilities so recognized by this court, resume possession of said property. The bills in these causes will be retained for the purpose of investigating such liabilities and obligations and for such other purpose as may seem needful. It is ordered that all claims against the receiver as such up to said thirty-first October, 1888, be presented and prosecuted by intervention prior to February first, 1889, and if not so presented by that date that the same be barred and shall not be a charge on the property of said company.

It is further ordered that the said receiver advertise in a daily newspaper in New Orleans and in Dallas the fact of his said
27 discharge, and a notice to said claimants to make claim within the time aforesaid, to wit, before the first of February, 1889, and that he post a printed notice of similar purport in the station-houses of said railway.

New Orleans, October 26th, 1888.

(Signed) DON A. PARDEE,
Circuit Judge.

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

[SEAL.] Witness my hand and seal of said court, at the city of New Orleans, this 28th day of December, 1888.

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 28th day of December, A. D. 1888.

EDWARD C. BILLINGS, *Judge.*

Filed December 1st, 1890.
L. R. TAYLOR,
District Clerk.

(*Order Dismissing as to Defendant John C. Brown, Receiver.*)

NANCY J. GAY *et al.*
vs.
JOHN C. BROWN *et al.* } 4384.

NOVEMBER 17TH, 1890.

The death of the defendant John C. Brown being suggested to the court, it is therefore considered and ordered by the court that this cause be, and is hereby, abated and dismissed as to said defendant, John C. Brown, and that plaintiff pay all costs, for which execution may issue.

28 (*Order on Demurrers and Exceptions.*)

NANCY J. GAY *et al.*
vs.
JOHN C. BROWN *et al.* } 4384.

DECEMBER 1ST, 1890.

Now comes on to be heard defendants' general and special exceptions to plaintiffs' pleadings herein, and the court, after hearing same and being fully advised in the premises, is of opinion that the law is against said general demurrers and 1, 2, 4, 5, 6, 7, 8, 9, and 11 special exceptions, and they are accordingly hereby overruled, to which defendants except. It is ordered by the court that the defendants' 3rd and 10th special exception- be, and they are hereby, sustained, to which the plaintiff- excepts.

(*Verdict and Judgment.*)

NANCY J. GAY
vs.
J. C. BROWN *et al.* } 4384.

DECEMBER 2ND, 1890.

This cause coming on to be heard, came the plaintiff- and defendants and announced ready for trial; and thereupon came a good and lawful jury of Tarrant county, viz., R. F. Boals and eleven others, who were duly selected, empaneled, and sworn, according to law, and who, after hearing all the evidence and argument of counsel thereon and receiving the charge of the court, retired to consider of their verdict and after mature deliberation returned into open court with the following verdict, to wit: We, the jury, find for the plaintiff- seven thousand five hundred dollars ($7,500.00) to be divided equally between the two plaintiffs, Nancy J. Gay and Bessie Gay, this 2nd day of December, 1890.

R. F. BOALS, *Foreman.*

It is therefore considered, adjudged, and decreed by the court that the plaintiffs, Nancy J. Gay and —— ——, do have and recover of

and from the defendant The Texas and Pacific Railway Company the said sum of seven thousand five hundred dollars, together with all costs in this cause incurred and expended, for which execution may issue.

29 Further ordered that execution issue against each party respectively for the costs by them herein incurred.

(*Charge of the Court.*)

NANCY J. GAY *et al.* }
vs. } 4384.
JOHN C. BROWN *et al.* }

The jury are instructed that if they believe from the evidence that the death of the husband of the plaintiff Nancy J. Gay was caused by reason of defective appliances for connecting the engine and tender on which plaintiff's husband was engaged and without his fault or negligence on his part contributing to the injury, and if they further believe the receiver operating the road of defendant company, or those of his agents whose duty it was to inspect said engine, knew or by reasonable care and inspection could have known that such appliances were unsafe, you should find for the plaintiff.

You are instructed, however, that a railroad company or receiver operating its road is not required to furnish machinery or appliances which are absolutely safe, but is only required to use such care in providing and keeping in repair its machinery as persons of ordinary prudence would use in regard to the same, having regard to the use for which such machinery or appliances are intended.

And if you believe from the evidence that the receiver operating the road of the defendant company, by his agents and employees, had exercised such care in providing and keeping in repair the machinery or appliances alleged to have been defective as persons of ordinary prudence would have done, or if the said machinery or appliances were reasonably safe, you should find for the defendant.

You are further instructed that every person engaging in the service of a railroad company thereby assumes all the risks ordinarily incident to such services, and the company would not be liable for an injury to such employee unless the same was caused by the negligence of the company or those operating same and without fault of the employee contributing to such injury, and unless you believe from the evidence that the death of plain-

30 tiff's husband was caused by such negligence on the part of the receiver in charge of the road of the defendant company or his servants, you should find for the defendant.

You are further instructed that negligence on the — of said receiver or his servants operating defendant's road is not to be inferred from the fact that the appliances or machinery *and* proved defective, but the burden is upon the plaintiff to establish by a preponderance of the evidence that the receiver operating defendant's road or his servants were guilty of negligence in providing such

machinery, if the same was unsafe and dangerous, or in failing to keep the same in reasonably safe repair.

You are further instructed that, though you may believe from the evidence that said receiver or his agents and servants operating defendant's road were negligent as alleged, yet, if you further believe from the evidence that the plaintiff's husband was also guilty of negligence in failing to exercise such care as a person of ordinary prudence would have used, and that such want of care on his part contributed to the alleged injury, you should find for defendant.

If, under the foregoing instructions, you should find for the plaintiff, you will assess the damages at such an amount as you may believe will reasonably and justly compensate the plaintiff and her child, Bessie Gay, for the pecuniary loss to them by reason of the death of said plaintiff's husband, and say by your verdict how much you award to each.

You are the exclusive judges of the credibility of the witnesses and of the weight of the testimony.

R. E. BECKHAM, *Judge.*

Filed December 2nd, 1890.

L. R. TAYLOR,
District Clerk.

(*Special Charge No.* 1, *Asked by Defendant.*)

In District Court, Tarrant County.

NANCY J. GAY
vs.
JOHN C. BROWN *et al.*

If the jury believe from the evidence that the deceased had been engaged in the shops of the Texas and Pacific railway,
31 working upon engines prior to the accident, and that he was aware of the fact that it was the custom of those operating said railway to run its engines or a considerable number of them without keys and slots in the coupling pin, then in that event the court instructs you that the deceased assumed all risks incident to the failure to have same, and for such injuries as may — resulted therefrom the defendant is not liable.

FINCH & THOMPSON,
Attorneys for Defendant.

Refused.
R. E. BECKHAM, *Judge.*

Filed December 2nd, 1890.

(*Defendant's Motion for New Trial.*)

In the District Court, Tarrant County, Texas.

NANCY J. GAY *et al.*
vs.
JOHN C. BROWN, Rec., *et al.* } 4384.

Now comes the defendant The Texas and Pacific Railway Company, by attorneys, and moves the court to set aside the verdict and judgment herein for the following reasons, viz:

1st. The court erred in overruling defendant's general and special exceptions.

2nd. The court erred in allowing plaintiff to prove that all engines on defendant's railway were equipped with slots and keys in the pin on the engine since the accident in question, as shown by bill of exception No. 1.

3rd. The court erred in refusing defendant's special charges number- from one to nine.

4th. The verdict and judgment are erroneous because the evidence showed without contradiction that neither the defendants nor its servants charged with the duty of repairing the engines
32 and coupling apparatus knew of the danger or defect in the coupling apparatus and pin, if any existed, but the evidence did establish beyond controversy that they, as well as all other railways and servants in charge of engines, round-houses, and machine shops, regarded like pins and coupling apparatus reasonable safe and secure.

5th. The verdict and judgment are erroneous for the reason that *the* if there were any defects in the engine and coupling apparatus plaintiff's husband assumed the same as one of the risks incident to his employment.

6th. The verdict and judgment are erroneous for the reason that there was nothing in the construction of the pin and coupling apparatus which would put a reasonable prudent man upon notice that there was danger in using them, and defendant and their servants exercised ordinary care and caution in the selection and use of said pin and coupling, no accident ever having been known to occur as this is claimed to have occurred.

7th. The verdict and judgment are erroneous for the reason that plaintiff's husband was guilty of contributory negligence in going upon said engine when he knew or ought to have known of the defect and danger complained of, if such existed, and further in standing astride the opening between the engine and tank when the pin rose into view, and in failing to push it in place if the accident occurred by the pin rising from motion of the cars.

8th. The verdict and judgment are erroneous because there is no evidence to sustain*ing* the conclusion that the pin rose up and came out as claimed, no witness having testified that such was the fact.

9th. The verdict and judgment are erroneous because it was established that there was provision made in the order finally discharging the receiver for the payment of such claims as plaintiff's, if she is entitled to anything, and, by the act of Congress under
33 which this suit was instituted, the court appointing and discharging the receiver still had equity jurisdiction of the claim and over this suit and the power and authority to provide for its investigation and payment. Wherefore defendant submits that said United States court had jurisdiction in the premises, and, having seen proper to exercise it, this court cannot deprive it of its power and jurisdiction in the premises by proceeding to judgment in this case.

Wherefore defendant asks that a new trial be granted herein.

FINCH & THOMPSON,
Att'ys for Def't T. & P. R'y Co.

Filed December 4th, 1890.

L. R. TAYLOR,
District Clerk.

(*Order Overruling Motion for New Trial.*)

NANCY J. GAY *et al.*
vs.
JNO. C. BROWN *et al.* } 4384.

DECEMBER 8TH, 1890.

Now comes on to be heard defendants' motion for new trial in this cause, and the court, after hearing all the evidence and argument of counsel and being fully advised, is of opinion that the law is against said motion. It is therefore considered, adjudged, and decreed by the court that the said motion for a new trial herein be, and the same is hereby, overruled; to which ruling of the court the defendant excepts and in open court give- notice of appeal to the supreme court of the State of Texas.

34 (*Defendants' Bill of Exception No.* 1.)

In the District Court, Tarrant County, Texas.

NANCY J. GAY *et al.*
vs.
JOHN C. BROWN *et al.* } 4380.

Be it remembered that on the trial of the above-entitled cause the plaintiff offered in evidence the 13th interrogatory and the answer thereto of the witness W. G. Dehn, the question being as follows: "State whether or not you now use slots and keys on the engines of the Texas & Pacific Railway Company."

To which question and answer defendant objected and insisted that evidence called for was not competent.

But the court overruled the objection and allowed the answer of

said witness to be read, as follows: "We did not have slots and keys in any pins at that date (time of accident). We use slots and keys now on all engines." The witness had previously stated that he was now and had been for a number of years blacksmith in the round-house or machine shops of the defendant at Fort Worth, Texas. To which ruling of the court defendant excepted at the time and tenders this its bill of exceptions, which is made a part of the record.

R. E. BECKHAM, *Judge.*

Filed December 29th, 1890.

L. R. TAYLOR, *District Clerk.*

(*Statement of Facts.*)

NANCY J. GAY *et al.* vs. JOHN C. BROWN *et al.* } No. 4384. Suit Pending in the District Court of Tarrant County, Texas.

35 Be it remembered that the following is a full and correct statement of all the evidence offered and received upon the trial of the above styled and numbered cause at the fall term of said cause, 1890:

NANCY J. GAY, plaintiff, testified as follows:

My name is Mrs. Nancy J. Gay. I am the plaintiff in this case. I was the wife of John M. Gay. He was killed on the Texas and Pacific railroad on the 23rd day of January, 1888. At the time he was killed he had been working for that company from some time in June before; he had been working in the T. & P. shop. At the time he was killed he was running on the road as fireman. He had been working as foreman one month. That was the first trip he had made on that particular engine. He was 33 years old. He generally had pretty good health; was strong. The last trip he was running he was running for so much a trip. He got $61 a month, the last wages he drew. This was a different employment he started out on. Could not just say how much he would make at that. It was better wages; it was a promotion from his former employment. He was getting — wages these trips than by the month. He had been married nine years; had one child, Bessie Gay; she is ten years old now; was seven years old at his death. He always supported his family. I had no other means of support than his labor. He took care of me. My husband, John M. Gay, was killed at 6.4 o'clock in the afternoon. The train that he went on left here, as near as I could find, after three. I don't know the exact time. After he started out I next saw him after he was brought back a corpse. My husband was an industrious, sober, hard-working gentleman; stayed at home and devoted himself to his family. Before he went to railroading he was farming. He commenced railroading in the June before he was killed. This little girl in the court-room is his daughter, Bessie Gay.

36 Cross-examination:

My deceased husband's parents are both dead. Prior to the accident he had been living here in Fort Worth from 1886. He came here in 1886. When he was at work west of here I was still living here. This was his first trip out from Fort Worth just prior to the accident. He had been working in the shops here just prior to the accident, from June—in the T. & P. shops. I suppose it was the round-house. He was working on the engine; could not say whether blacksmithing or carpentering.

Q. You just know he worked at the round-house?

A. He just worked at the shops. I could not say what he done. He had worked at Big Springs four weeks, firing on an engine on the west end. He did not work in the shops out there. He worked in the shop here. I never did ask him what he did work at. He was working on the engines.

Redirect examination:

I was 37 years old my last birthday.

F. W. RACE, for the plaintiff, testified:

I am now engaged as locomotive engineer on the Texas and Pacific railway; was acting in the same capacity on the 23rd January, 1888, the time John M. Gay was killed. I was engineer of the train he was killed on. The engine was No. 153. It was what they call a Mogul engine; sometimes called a hog engine. It is rather a nickname for them. The original name is Mogul—Rogers' Mogul. I think I was called to go out that afternoon at one o'clock. We did not get out of the yard until 3.30; somewhere thereabout. L. B. Kennedy was the conductor and Hooves and Coleman were the two brakeman. I think we had 16 cars in the train, all told, besides the caboose. We were loaded principally with railroad iron; new rails. We were going west from Fort
37 Worth. When this accident occurred we had gone about 23 miles west of Fort Worth. There was nothing particular happened between Fort Worth and the place of the accident. I met one train and went into a side track at Benbrook; met one train, I think, between Fort Worth and the point where the accident occurred. We backed out of the side track at Benbrook and went on west until the engine broke loose from the tender and the man fell through and was killed. At the time the engine broke loose he was in the act of putting in fire; shoveling in coal. That was his duty. He was fireman. I never had seen him until that day he came on the engine to go out with me as fireman. That was the first time he had ever been on that engine, to my knowledge. The train, at the time of the accident, was going somewhere between 18 and 20 miles an hour, perhaps; about the usual speed of freight trains. All the way from 15 to 20 miles an hour is the usual speed. The train was going very little upgrade. I saw the engine was broke loose from the tender, and I stopped as soon as I possibly could, and I found the fastenings, the safety chains, were broken

and the pins were back to their place; the pin that held the front end of the drawbar into the engine was down in its place and the drawbar was in the tender. That is what I found on stopping and examining. That was after the train had run over the man and killed him. The engine and tender are coupled together with a drawbar, with a large pin in each end, and also two safety chains that are supposed to hold the weight of the engine in case the pin or drawbar should break. There is a coupling drawbar (we do not call it a link) that fastens the tender and engine together, by means of two pins, one in each end of the drawbar—one in the tender and one in the engine. The drawbar passes into a piece of iron fixed for the purpose in the engine and tender, and pins are dropped in to hold it to its place, on either side. When I examined
38 the engine and tender after the accident the drawbar was in the tender. The drawbar in the defendant's model, now shown me, is something similar to the one on the engine in question. It is an iron drawbar, with a pin in each end of it, that holds the engine and tender together. When I stopped to examine it I found the pin back to its place and the drawbar was in the tender. It was loose from the engine. How it came loose I could not say positively. That was the condition it was in when I saw it after the accident. When I left Fort Worth and en route the drawbar was fastened to the engine. The safety chains are two large chains fastened here by means of pins that go through here and then through into the timber of the tender. They are put upon an engine to make it doubly secure in case the pins or drawbar should break. Of course, if they hold the weight of the engine there would be a little jerk there which would attract attention, and consequently you would have a chance to shut off steam and stop and fix them. "Safety chain" is simply a name they have to distinguish them from any other chain that would be about an engine. They call them safety chains, I suppose, because they are placed there for that purpose—for the purpose of holding the engine in case the pin should break or become uncoupled. There are two of them. On this occasion, when the train came uncoupled, those chains did not stop the engine, so I could slack up—did not make any halt in the engine leaving the tender. They were broken and the fireman fell through between the engine and tender. They were broken because the bolts were not strong enough to hold them. The bolts were broken. I could not tell the exact size of the chain, because I did not take the dimensions of it. It was an unusually large chain, though. The bolts that gave way were, I should judge, about $\frac{3}{4}$ or $\frac{7}{8}$ inch, perhaps. They were smaller than usual. They have heavier engines
39 than those Moguls, and they have a great many lighter ones. It was at that time considered to be one of the heaviest engines in use on the T. & P. I have been an engineer, up to this date, about four years and a half. Before I was an engineer I fired a locomotive for about three years and eight months. I worked on the railroad before that. I am quite familiar with stay-chains and bolts and these sort of things about an engine. From my knowl-

edge as an engineer and fireman and my practical knowledge as a railroad man I do not think those bolts in that engine on that occasion were sufficiently strong to hold the engine and tender together to effect the purpose for which they were put there. That coupling pin had not slot nor keyhole in it; no place for a key. The pin was, I should judge, perhaps 17 or 18 inches long. It had no slot for a key in the lower end of it. It is habitual or usual for coupling pins to have keyholes or slots for keys in them. The purpose of the slot and key is to keep the pin from working up; keeping it down to its proper position to hold the drawbar. The slot should be a sufficient distance from the end of the pin to have it strong enough to keep it from breaking out. They usually have a key about an inch wide, made of iron, and a slot in the pin wide enough to admit that, and the key is bent up then to keep it from coming out. It is a split key; goes through, and the ends are bent out so it will not work out. If that pin in that engine had a slot in it and a key, it would not have worked out—if it did work out. If it had been so coupled, the engine and tender could not have become uncoupled without the drawbar breaking or the castings. They did not break on this engine. If the bolt that broke had been of sufficient size and strength to have effected their purpose for which they were made, I do not believe the engine could have left the tender sufficiently to have permitted the plaintiff's husband to fall through as he did. I had observed Gay, had my eye on him about a minute or two minutes, something like that, before this accident occurred. I was about seven or eight feet, I should judge, from the position he was in, putting in fire in the fire-box. He fell down in there and the whole train ran over him when I found him. He was instantly killed, mangled up. He was apparently a strong, healthy man, so far as I could see. I had never met the man before that day; know nothing about his strength or habits or character as a man, any more than what I saw on the engine.

Cross-examination:

I am an engineer. When I start out on a trip my duty is to take the engine near the turn-table at the round-house, after it is taken out of the round-house. I always examine an engine on arriving at a termination poi-t, Fort Worth or Baird, to see whether there is any necessary work that should be done. I see that there is nothing wrong with it or anything that needs to be done; I report it on the book for that purpose.

Q. What kind of examination do you make? Did you sto-p down to look at that one?

A. Yes, sir; very frequently go under and engine and see if bolts and excentrick*s* and everything of that kind are all right. I could see whether it had a slot and key or not if I went under it for that purpose, to examine. I might go under there for some other purpose, perhaps, and not take any notice of it. It is a fact that by just stooping down slightly you can see under one of those engines

and see whether it has a key and slot. I had run that engine once prior to this time. I went to work for the Texas and Pacific road in October, 1884, the last time; have been working for them
41 steady since that time. I expect I had run an engine before that time a great many times without a slot and key; a great many engines I have run without them. It is not a fact that all the engines I had run on the Texas and Pacific did not have keys. I had run engines previous to this that had slots and keys, and I had run a great many without them. I found out they did not have slots and keys by examining, of course. If it did not have a key, all I could do would be to report it and have one put it, provided the foreman saw fit to put one in. I did not have keys put in all the engines I ran. In this case I did not know until after the accident occurred whether it did or did not have a slot and key. I never examined engines on other roads than the T. & P. coming to Fort Worth, and don't know it to be a fact that there was hardly an engine on the T. & P. R'y or any other road coming to Fort Worth that had a slot and key. It is not a fact, within my knowledge, that nearly every freight train on the T. & P. road lacked a slot or lacked a key. I don't know all the engines. I will say the majority of engines I had been running were running without slots and keys; don't know how it is on the other end of the. road, where I do not run; never examined any engine on the other parts of the road; never examined any engine unless I was sent to go out. There was one bolt for each chain holding the safety chains to the tender. It is not a fact there were two; I am positive about that. I do not say none of those Mogul engines have two. I said this engine had only one. There had a great many repairs been made on this engine. This engine had been working on the T. & P. for several years; three or four or five years. There was one bolt holding each chain in the tender, and that bolt was about three-quarters—not over seven-eight-s—inch. It is not a fact, to my knowledge, that at that time the railway company had heavier
42 engines — that engine. This engine had unusually heavy iron for the stay chains. On this engine in question the pin would be here (illustrating with the model); nearly as close to the fire-door as you could get it—that is, to get it down through. The engine and tank at the coupling point are supposed to come right close together. There is an iron apron attached to the engine which goes right over the space and usually covers the back pin. I don't recollect whether it covered the back pin on this engine or not. My seat was about here. From my seat across diagonally to this point would be about six feet. At the time the engine gave a jump forward I would be looking ahead. Gay was across, on the other side of the boiler, when I last observed him; his seat was on the other side, and he stepped down out of the gangway to put in the fire. He was standing sideways to me at the time; he did not have the shovel in his hand. The shovel was in the tank. He always leaves the shovel, with a shovel of coal in it, setting in the tank. There is where it was setting. I said he was firing up at the time the accident occurred, the last time I saw him before I

felt the jerk, as I said before, over here on his side of the cab. He was not standing then firing up; but the last time I saw him he was in the act of falling through on the ground; that was after the jerk. The last time I saw him before the jerk he was standing in the cab; perhaps two steps from where the shovel was; standing up in the cab. The last time I saw him he had his shovel, but that was after the jerk. He had the shovel when the jerk came; he had one hand hold of the shovel and was going down head first toward the ground. Of course, there was nothing he could get hold of to save himself, or he would have done so, I suppose. The fire-door was open; he had opened it. To open the fire-door and fire up he could stand with his left foot on the apron and his right foot on the tank. With his left foot on the engine that would
43 throw him astride the apron or opening. I don't remember exactly, but I think he had to take one step back to get a shovel of coal. He opens up the door, puts a shovel of coal in, closes the door again to keep the cold air out of the box. He puts in about three or four shovelsfull at a time. He puts in one shovelfull, closes the door, and goes back after another shovelfull. When he gets it he puts his foot where he can reach the door, opens the door, and throws the shovelfull. He lets the shovel rest on the bottom of the tank until he gets the door open and then takes it with both hands and puts it in the fire-box. I did not see him just before the jerk, but when I looked around he was in the act of falling. Of course, he must have had one foot on the engine and the other on the tender. His shovel went down. I don't recollect what became of his cap. He left the fire-door open. If that pin should rise up while the train was going so as to allow the bar to come out, and the pin was 17 or 18 inches, the head of the pin would rise above the bottom of the door perhaps three or four inches. This accident occurred in the evening, about 6.25, I think, or somewhere thereabout. I think I left town about 3 o'clock or 3.30; somewhere along there. It would not take three hours to run that far if we ran right along, but we were delayed some by meeting the other train. We sidetracked for a train. It was dark (at the time of the accident). We had the headlight lit. We light the headlight between daylight and dark—twilight. With the door open and the fire in the engine it would have shown out of that door and lit up right in front of it. If that pin should rise up gradually high enough to allow the drawbar to come out, I think the light from the door would have shown on the pin. L. B. Kennedy was the conductor on that train and Hoover and Coleman were the brakemen. One of them was in the caboose and the other was on the engine at the time of the accident; that was Hoover. The
44 conductor has control of the brakemen of a train. I don't know where Hoover is now; don't know how long after that before he left here. At the time Kennedy came around that night to the engine he had got off from the engine and started back; Hoover had started back toward the back end of the train. I didn't measure the ground, but I should judge from the distance we walked after we passed the caboose (the train was standing still) that we

found Gay's body about 100 yards behind the caboose. We were going into Anita station at that time, going west. It is gradually upgrade about four miles this side of Anita—for about three miles and a half. At the time the accident occurred we were running about 18 or 20 miles an hour, I should judge. We had what we call a full train—16 cars of iron. Some cars are 30 feet in length and some 33. There is a space between them sufficient to allow a man to step in and make a coupling. When the slack is all taken out the space between them is between two and a half and three feet, I should judge.

Redirect examination:

If it has been necessary to have the engine uncoupled, it is the duty of the carpenter, I believe, to couple it up and fix it up to start out with. The fireman, in going off on an engine, does not have to inspect or have anything to do with it except to get on it and fire it. His duty is to fire his engine and draw his supplies of oil and waste for the engine—do the firing; that is all. Defendant's counsel asked me if it was not a fact this engine had two bolts in the stay-chain. I told him it was not that I know of. That is the way I understood the question. This one had one. I don't know of any engine having two bolts for one chain. This fireman, Gay, getting aboard that engine, would not be apt to see whether the coupling pin had a key in it or not. It was not his duty to look after such things. The apron that covers the space was fastened to the engine. I don't recollect whether it covered this back pin or not. Some of them do and some don't. It would be attached to the engine so that it would come back of the engine pin. If the pin worked up gradually it would rise two and a half or three inches; somewhere along there. That would depend on the length of the pin, how far it went through, how far it would have to work up to let the drawbar out. If the pin only went down here and didn't come through the bottom it would not have to work so far up to let the drawbar out. When the door of the engine was shut it was dark there in front of the engine door. That pin was not long enough to admit a keyhole and key. As engineer, I made a written statement to this company of how this accident occurred.

Recross-examination:

I don't recollect when Hoover quit work for the T. & P. Railway Company; it has been some time. I don't think he worked for the company but for a few months after that, if I recollect right. He was in the capacity of brakeman. I don't know where Gay worked prior to this time. I think he told me he had worked in Big Springs; that he had been firing out there about three or four weeks, or something like that. When I went into a station I would go round and examine my engine; if I found the pin did not have a slot and key I would report that fact. I never reported this engine. Prior to the time the accident occurred I didn't know whether it had a slot

and key or not; didn't know until I examined it afterwards. I do not always examine an engine when I go out on it to see if it has a slot and key. I have stated that, to the best of my judgment, this pin was about 17 or 18 inches long. I didn't measure it.

Q. Where did you make your examination upon which
46 you base your statement that you don't think it was long enough to admit a slot and key?

A. Right at the point the accident occurred. I brought that engine back with that pin in it. It was pulled in as a disabled engine for the reason that *the reasons that* the water connections were broken and we could not get water in the boiler. There was no slot nor key there, and the pin was not long enough to admit one. We went and examined it, and we didn't find it long enough to put one in. He and I went. I did not claim then that the reason it occurred was that the beam in which the stay-chains went was rotten. Mr. Dietz spoke of that himself; I did not speak of it. He did not dig into the side of it and show me it was solid at that time. Dietz and I did go together and look at the pin.

The plaintiff introduced certified copy of record in the case of The Missouri Pacific Railway Company *vs.* The Texas and Pacific Railway Company *et al.*, pending in the United States circuit court for the fifth circuit and eastern district of Louisiana, as follows:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

THE MISSOURI PACIFIC RAILWAY COMPANY
versus
THE TEXAS AND PACIFIC RAILWAY COMPANY. } No. 11181.

W. P. Ballinger, for the complainant; Baker, Botts & Baker, solicitors for the defendant; W. W. Howe, for the defendants.

47 In the Circuit Court of the United States for the Eastern District of Louisiana. In Equity.

THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation Incorporated under the Laws of the State of Missouri and a Citizen of said State of Missouri,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, a Corporation Created by and Existing under Certain Acts of Congress of the United States. } Of — Sessions. No. 11181.

To the honorable the judges of the United States circuit court in and for the fifth circuit and eastern district of Louisiana:

The Missouri Pacific Railway Company, a body corporate under the laws of the State of Missouri and a citizen and resident of said State, in its behalf, as well as of all other corporations and persons

similarly situated that may *be*, by intervention, bring themselves into this suit for the protection of their interests, brings into this honorable court its bill of complaint against the Texas and Pacific Railway Company, a corporation existing under the laws of the United States of America and having properties and rights in the State- of Louisiana and Texas, under and by virtue of the laws of both of said States, and having, at the same time, citizenship and domicile, officers and places of business in this district and officers and agents here in the city of New Orleans on whom process may be served.

48 And thereupon your orator complains and says:

1. That the Congress of the United States of America, by an act approved March 3rd, 1871, created a corporation under the name and style of the Texas and Pacific Railroad Company, and by an act approved the 2nd day of May, 1872, supplementary to the said original act, changed the style and title of the Texas and Pacific Railroad Company to "the Texas and Pacific Railway Company," and by said acts the Texas and Pacific Railway Company was authorized and empowered to construct a line of railway from a point at or near the eastern boundary line of the State of Texas, near the town of Marshall, in Harrison county, westward to the western boundary line of the State of Texas to a point at or near a point opposite to El Paso, in the Republic of Mexico, and thence westward, as set forth in said act, to the Pacific ocean, at San Diego, and by the fourth section of said original act the said Texas and Pacific Railway Company was authorized to purchase the stocks, land grants, franchises, and appurtenances of and consolidate, on such terms as might be agreed upon between the parties, with any railroad company or companies heretofore chartered by congressional, State, or territorial authority on the route prescribed in the first section of the act, etc., and is also authorized to own, maintain, and operate a railroad to Shreveport, Louisiana.

2. That the legislature of the State of Texas, by an act passed May the 24th, 1871, entitled "An act to encourage the speedy construction of a railway through the State of Texas to the Pacific ocean," by its eleventh section authorized the consolidation with the said Texas and Pacific Railway Company of the Southern Pacific Railroad Company and the Southern Trans-Continental Railway Company, two corporations before that time organized under the laws of the State of Texas, the first of which was authorized to construct a line from the eastern

49 boundary line of the State of Texas at or near Marshall westward to El Paso, on the Rio Grande, and the last-named corporation was authorized to construct a line from Marshall, in said State, northwardly to Texarkana and westwardly by Clarksville, Paris, and other points to El Paso; and said act of May the 24th, 1871, authorized the Texas and Pacific Railway Company to consolidate with two corporations on such lawful terms and conditions as might be agreed upon between the said companies and should be ratified by a majority of the stockholders of each of the corporations so consolidating.

3. That by an act of the Texas legislature passed November 25th, 1871, entitled "An act amendatory of and supplementary to an act entitled 'An act to encourage the speedy construction of a railway through the State of Texas to the Pacific ocean,' passed on the 24th day of May, 1871," said act of the 24th of May, 1871, was so amended as to require a junction of the said Southern Pacific Railroad Company and the said Southern Trans-Continental Railway Company at a point westwardly to be agreed upon by said companies, which act was complied with by said two last-named companies by an agreement in writing filed in the office of the secretary of state of the State of Texas and dated the 6th day of May, 1872, fixing the point of junction at or near the city of Fort Worth, in the county of Tarrant, in said State of Texas.

4. That on the 21st day of March, 1872, the said Texas and Pacific Railway Company and the said Southern Pacific Railroad Company executed and filed with the secretary articles of consolidation, in pursuance of the legislation aforesaid, and on the 30th day of March, 1872, articles of consolidation were made, executed, and filed in the office of secretary of state of the State of Texas between the Southern Trans-Continental Railway Company and the Texas and Pacific Railway Company, in pursuance of the legislation aforesaid, by which said consolidations the said The Texas and Pacific Railway Company became entitled to and vested with the rights, franchises, property, and privileges of both the Southern Pacific Railroad Company of Texas and the Southern Trans-Continental Railway Company of Texas as aforesaid, and was also invested with all the rights and privileges of the Southern Pacific Railroad Company of Texas in and to a certain lease before that time made and entered into by and between the Southern Pacific Railroad Company of Texas and the Vicksburg, Shreveport and Texas Railroad Company, existing under the laws of the State of Louisiana, in and to that portion of the line of said 1st-named company extending from Red river to Shreveport, westwardly to the Texas State line, by which said lease the said Southern Pacific Railroad Company had the right to use and operate for its own exclusive use the lines so leased from and until the month of February, in the year 1884, at which said latter date or soon thereafter the said The Texas and Pacific Railway Company renewed said lease, with certain modifications therein contained, under and by virtue of which renewal the said The Texas and Pacific Railway Company has the right to continue to operate and maintain that portion of said leased line between the eastern boundary line of the State of Texas and its junction with the road of the New Orleans Pacific Railway Company, near the western boundary line of the city of Shreveport, on the terms and conditions therein stated, and with certain other rights and privileges herein contained, which will more fully appear by reference to the copy of the lease itself, which will be filed in this cause.

5. That by an act of the legislature of Texas on the 22nd day of May, 1873, entitled "An act to adjust and define the rights of the

Texas and Pacific Railway Company within the State of
51 Texas, in order to encourage the speedy construction of a rail-
way through the State to the Pacific ocean," the consolidations aforesaid were fully recognized and ratified by the legislature of Texas and the manner and mode of the construction of its line and railway were fully defined; and by said act there *was* donated by the State of Texas to the said Texas and Pacific Railway Company twenty sections of land, of six hundred and forty acres each, for every mile of its road completed in good, substantial running order to the State of Texas upon the terms and conditions prescribed in said act; and it defined the limits within which the lands aforesaid should be located as the construction progressed in sections of twenty or more miles.

6. That, among other supplementary and amended acts passed by Congress, the one approved June the 22nd, 1874, recognized and ratified the consolidations of the Southern Pacific Railroad Company of Texas and the Southern Trans-Continental Railway Company of Texas with the said Texas and Pacific Railway Company and provided that the road so merged, for the purpose of the mortgages therein authorized, as well as for all other purposes, be deemed and taken to be a part of the said Texas and Pacific railway and subject to all provisions and limitations of the act of Congress incorporating said company and of the supplements thereto.

7. The said Texas and Pacific Railway Company organized under the act of Congress aforesaid and accepted the provisions of the various acts above recited of the State of Texas and completed its line from the eastern boundary line of the State of Texas, near the city of Marshall, westwardly to a point about thirty-one miles east of El Paso, and it reaches El Paso by a joint agreement by the Galveston, Harrisburg and San Antonio railway (known generally as the Southern Pacific railway) over its line into El Paso. It also completed its line from Marshall by way of Jefferson to Tex-
52 arkana and from Texarkana westwardly by way of Clarksville, Paris, Bonham, Sherman, and Pilot Point to a junction with its southern line at Fort Worth, and received from the State of Texas from time to time about five million acres of land for the construction of its line east of Fort Worth.

8. That by deed dated the 20th day of June, 1881, by and between the New Orleans Pacific Railway Company, party of the first part, and the Texas and Pacific Railway Company, party of the second part, which deed is hereby referred to as part hereof, of this bill, the Texas and Pacific Railway Company, by virtue of the franchises obtained by its various charters from the Government of the United States and acquired by the legislation of the State of Texas and by virtue of the authority conferred by the laws of the State of Louisiana, acquired by and under said name the railway and all the franchises and rights and appurtenances thereto of the New Orleans Pacific Railway Company, a line constructed and being operated between the city of Shreveport, in Caddo parish, Louisiana, and the city of New Orleans, including a branch extending to West Baton Rouge, on the Mississippi river, which lines were encumbered prior to the

said purchase and acquisition by a mortgage executed by said New Orleans Pacific Railway Company to the Fidelity Insurance, Trust and Safe Deposit Company of the City of Philadelphia to secure an issue of six per cent. bonds, interest payable semi-annually, at the rate of $20,000 per mile, limited to an aggregate issue of $7,000,000, of which $6,720,000 are now outstanding. Said mortgage was duly made July 31st, 1880, and a mortgage supplemental thereto was made July 1, 1884, and both duly recorded in the parishes through which the said line passes in Louisiana.

9. That on the 15th day of May, 1875, the said Texas and Pacific Railway Company made and executed a first mortgage upon
53 the lines of the Eastern division, being all the lines of said company between Fort Worth and the Louisiana State line, to secure an issue of $8,000 per mile of gold bonds, due and payable on the 1st day of March, 1905, bearing interest at the rate of six per cent. per annum and payable semi-annually (said issue being limited to 4,193 bonds), on the first day of March and September, and the coupons have been regularly paid up to this time. The original trustees under said mortgage were Matthew Baird and Samuel M. Felton. On the death of Matthew Baird George D. Krumbhaar was appointed his successor, and the present trustees both reside in the city of Philadelphia, State of Pennsylvania.

10. That on the first day of June, 1875, said Texas and Pacific Railway Company executed a mortgage upon the property last before mentioned to secure, and authorized issuance of, bonds aggregating $13,100,000, due the first day of June, 1905, and bearing interest at the rate of six per cent. per annum, by coupons due and payable in June and December of each year, all of which are now either outstanding or bearing interest in favor of the sinking fund. The trustees named in said mortgage were Matthew Baird and Samuel M. Felton. Said Matthew Baird having died, George D. Krumhbaar was appointed as his successor, and is now acting as such in conjunction with the said Samuel M. Felton, both of whom reside in the city of Philadelphia, State of Pennsylvania. The two mortgages last above named also embrace and include, by their express terms, the leasehold line between the Texas State line and Shreveport.

11. Said railway company on the 15th day of May, 1875, made and executed its income and land-grant mortgage upon all the lands granted by the State of Texas for the construction of that portion of the line called the Eastern division lying east of Fort
54 Worth and west of the State line between Texas and Louisiana, being an aggregate authorized issue of $8,908,000 in bonds, bearing interest at the rate of 7 % per annum, payable annually, in July of each year, in currency or script, with William T. Walters and George D. Krumbhaar as trustees, both of whom have since resigned, and Charles E. Satterlee and George Gould were appointed and are now acting as trustees in their stead, both of whom reside in the city and State of New York; and on the 23rd day of March, 1876, said company executed a supplementary mortgage to said income and land-grant mortgage, creating a lien upon

it- railway and the income and profits thereof east of Fort Worth and west of the Texas State line, as well as the net income of Shreveport leased line, subordinate to the first and consolidated mortgage above mentioned, of which said supplementary mortgage the said George Gould and Charles E. Satterlee are now the trustees. Of the bonds authorized and issued under said original and supplementary mortgage about eight millions are now outstanding, with a large amount of interest scrip in lieu of interest accrued and not earned by the railway company, and consequently not payable in money by the terms of the mortgage.

12. That the said railway company on the 30th day of January, 1880, desiring to extend its lines westward from Fort Worth, made and executed its mortgage upon its lines west of Fort Worth, called the Rio Grande division, El Paso, not then encumbered by any lien, to secure an authorized issue of $15,400,000 gold bonds, bearing interest at the rate of six per cent. per annum, interest payable in February and August of each year to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, of which bonds there are now outstanding $13,028,000.

13. That on the first day of August, 1884, said railway
55 company executed a general and terminal mortgage upon its terminal and other properties at New Orleans and elsewhere, including the Gordon coal mines and lands and tracts supposed not to be covered by any other mortgage, said mortgage covering the entire property of said defendant company from New Orleans to El Paso, to secure an authorized issue of $6,500,000 of bonds, called terminal bonds, due on the first day of October, 1905, bearing interest at the rate of six per cent. per annum, due and payable on the first days of April and October in each year, and of which authorized issue there are now outstanding or held as collateral for the payment of other debts bonds amounting to nearly, if not quite, three million of dollars.

14. In addition to the indebtedness above named, the said railway company is indebted to the State of Texas, on account of a special fund loan to its predecessor, the Southern Pacific Railroad Company, about $167,642, bearing interest at the rate of six per cent. per annum in currency, and interest and sinking fund payable in May and November of each year, and which said amount is a statutory lien upon said property formerly owned by the Southern Pacific Railroad Company, and of a dignity anterior to any of the mortgages aforesaid upon the part of the property of the said Texas and Pacific Railway Company.

15. That the defendant, The Texas and Pacific Railway Company, is now the owner of about one thousand four hundred and eighty-seven miles of completed road, of which there is in the Eastern division, between Texarkana, Shreveport, and Fort Worth, five hundred and thirty-two miles; in the Rio Grande division, between Fort Worth and El Paso, six hundred and nineteen miles, and in the New Orleans division, between Shreveport and Gouldsboro and New Orleans, three hundred and thirty-six miles; that the
56 funded indebtedness of the said company under the several mortgages hereinbefore referred to — as follows:

Bonds issued under the first mortgage of June 1st, 1875, and a charge upon the Eastern division, $3,784,000, exclusive of the balance of the issue now held by the sinking fund.

Bonds under the consolidated mortgage of June 1st, 1875, a second charge upon the Eastern division, $9,316,000; income and land-grant bonds, a third charge upon the Eastern division and a first charge upon the land grant of the company, about $8,300,000.

Bonds issued under the mortgage of January 20, 1880, and a first charge upon the Rio Grande division, $13,028,000.

Bonds issued under the mortgage of July 31st, 1880, and a first charge upon the New Orleans division, $6,720,000.

Bonds under the mortgage of August 1st, 1884, and a first lien upon certain terminal properties and a general lien upon all the property subject to prior mortgages issued and outstanding as collateral, about $2,624,000.

That your orator, The Missouri Pacific Railway Company, is the owner in its own right *and* nine hundred and ninety-five miles of railroad, mostly located in the State of Missouri, and extending westwardly from the city of St. Louis to Kansas City and Omaha; that in addition to the lines of road owned by it in its own right your orator is the lessee, or by ownership of stock or traffic arrangements controls or operates thirty-five hundred and sixty-four miles of road belonging to other companies, exclusive of the lines of defendant company, which will be hereafter referred to. In said forty-five hundred and fifty-nine miles are included the lines of the St.

57 Louis, Iron Mountain and Southern Railway Company and its branches, extending from St. Louis southwestwardly to Texarkana and other towns in Arkansas, in all *the* nine hundred and twenty-three miles; the lines of the Missouri, Kansas and Texas Railway Company, extending southwardly from Kansas City through Kansas, the Indian Territory, and Texas, in all thirteen hundred and eighty-six miles; the lines of the International and Great Northern Railroad Company and its branches, extending from Laredo, on the Rio Grande, northeastwardly through Texas, in all eight hundred and twenty-five miles; the Central branch of the Union Pacific railway, in the State of Kansas, in all three hundred and eighty-three miles; since 1881 the Texas and Pacific Railway Company, by an arrangement made between it and the Missouri Pacific Railway Company, by which the lines of the Texas and Pacific Railway Company were to be and, in fact, have been operated in conjunction with the Missouri Pacific and its leased and operated lines, under the belief that such operation would be — the mutual benefit of both companies, and that if any deficit should occur in the operation of the Texas and Pacific line the complainant, The Missouri Pacific Railway Company, would advance the same on the faith of the earnings of the Texas and Pacific Railway Company, to be repaid out of such current earnings; but said earnings proved wholly insufficient for the purpose, and up to September 30th, 1885, the date of the last account stated between the two companies, your orator had advanced in the payment of operating expenses and interest on account of the Texas and Pacific Railway

Company the sum of $1,688,015.79, of which the sum of $1,130,783.60 is represented by four promissory notes bearing date the first of December, 1884, payable on demand, and the balance of $557,143.19 is the balance stated in account current of September 30th, 1885, since which time said indebtedness has still further increased to the date of filing hereof.

58 16. The detail provisions of all said mortgages will fully appear by reference to copies of said mortgages, herewith exhibited and made a part of this bill of complaint and marked Complainant's Exhibits Nos. 1, 2, 3, 4, 5, and 6, respectively.

17. Your orator further says that all the rolling stock, equipment, and appurtenances of every kind and character owned by the said defendant company are covered by the said mortgages herein set forth and made exhibits hereto; all of which locomotives and cars for- a part of the general equipment of the said railway company, which said railway company is in fact and under the laws of the State of Texas and its charter by the laws of the United States one single and indivisible railroad, except in so far as the mortgage existing upon the property of the New Orleans Pacific Railway Company may be a lien upon the equipment that belonged to and constituted part of that line of railway before its purchase by the Texas and Pacific Railway Company.

18. Besides the large indebtedness of said railway company secured by mortgages as aforesaid, it owes a large floating debt to the complainant, some of which are debts created and incurred for labor, material, repairs, and operating and managing expenses necessary for the conduct of its business, exceeding one million and a half of dollars.

19. Your orator, further complaining, avers that for several years past said company's expenses have been so large that its surplus has been insufficient to pay the current interest on the mortgage bonds aforesaid as it matured, and that the necessary maintenance and repairs of its property have been neglected in the false policy of ab*h*ortive efforts to pay the interest upon its bonded debt as it matured, and while its current interest amounts annually to nearly $1,900,00, exclusive of the income and land-grant bonds, its

59 net receipts will not, for the current year last past nor for the present year, equal one million dollars per annum, so that a default without borrowing money for the purpose of paying maturing interest is inevitable.

20. Your orator, further complaining, says that it is a creditor of the defendant company for large sums of money from time to time advanced, and up to the present time continually, at defendant's request, and for the purpose of protecting it against default at various times for proper equipment and improvements that were necessary to be made in order to operate the road, as well as for necessary supplies, monthly payment for labor, and current repairs, without which the defendant railway company could not have maintained its property in a condition for its operation, and, besides this, has advanced money from time to time to pay the current interest, which the said defendant company was unable to meet in conse-

quence of a deficiency in its earnings. Said sum so advanced will amount to $1,500,000. The defendant company requested these advances and loans from time to time, and they were made by your orator on the promise of said defendant company and reliance by your orator to pay the same out of its current earnings, and the same were made in protection of the corpus of the property and in the interest of the holders of the various securities of said company and on the faith and promise of said current earnings; and your orator further avers that the same was in equity and good conscience and is a charge alike upon the income and property of said railway company. But the said defendant company has neglected and fails to pay said balance or any part thereof, but instead of so doing has been applying its earnings to the payment of large amounts of interest falling due from time to time in the vain effort to avert a default
60 in the payment of its interest. The only security your orator has for the payment of these advances in addition to its said equitable lien thereupon as a collateral of $2,000,000 of the bonds of said defendant company known as the terminal bonds and more particularly referred to in paragraph 13 of the bill, which bonds are secured by a general mortgage covering the entire property of said company; and your orator is thereby a lien bondholder on the said entire property, land, — premises of said defendant company, and that without such relief as herein sought said bonds will be greatly depreciated in value, and no adequate remedy for the protection, security, and payment of the same; that the trustee in the mortgage securing said bonds is the Fidelity Insurance, Trust and Safe Deposit Company, a citizen of the State of Pennsylvania, which is out of the jurisdiction of this court, but it will be made defendant to this bill if it appears within this jurisdiction or as soon as the same can be done under the practice of the court.

And your orator further avers that the defendant company has no property known to your orator upon which it could levy an execution, even if it should recover judgment, except the property aforesaid, which is subject to mortgages in amount as much or more than the present value of the property.

21. Your orator further avers that the railway of said defendant railway company is in bad condition and needs a large amount of steel rails to replace iron rails already worn out, and needs an expenditure of large sums of money to replace bridges which have for a long time been used and which are of wood and most of which rest upon wooden substructures. In fact, from the best estimates that your orator has been able to have made by engineers and other experts, the road-bed of said railway of the defendant company cannot be put in first-class condition without the expenditure
61 of such sums as will still further disable it from paying its fixed charges, and, with its property mortgaged as it is up to, if not exceeding, its full value, it is wholly impracticable to incumber it with any further liens, as the security thus issued must be sold at ruinous discount to realize cash.

22. Your orator believes, and so avers, that the railway lines afore-

said of the defendant company, if put in first-class condition, would without doubt have an earning capacity and a traffic that would enable said company to pay off its entire floating indebtedness and at the same time meet the fixed charges created by its mortgages without difficulty, but that it is essential to reach this result that the whole of its property should remain intact and not be segregated, but that if the three separate divisions of this property should be foreclosed under the divisional mortgages resting upon each, which your orator believes and fears will be done, that its value would be so impaired as to cut off entirely the possibility of the payment of the floating indebtedness now existing or any part thereof, but that if said railway shall be administered under the orders of the court as a whole and placed in good condition it might be saved from foreclosure entirely and satisfy the equitable indebtedness thereon to your orator and all others. But if this desirable result should not be realized, yet it is almost certain that after the property shall be improved as herein suggested and then sold as an entirety and under proper proceedings your orator believes that the proceeds of the sale would be ample to discharge all incumbrances created by said lien and the whole of the floating indebtedness of said company, but that to reach this result it is essential that said railway be retained in a condition of unimpaired efficiency
62 by the expenditure of a necessary portion or the whole of its revenue to improve its road-bed and maintain its equipment.

23. Your orator further avers that the whole of the floating indebtedness before mentioned has been incurred within the last few years, and much of it during the current year and up to the present time, and that a very considerable portion of it was for new rails and ties to maintain the road in running order, and a portion, as before stated, was advanced to pay current interest, and other portions to pay current wages of employés of the company.

24. Your orator believes, and, indeed, has no doubt, that unless restrained by the interposition of this honorable court the current earnings of the railway company and all of its available valuable resources will be appropriated by its officers to pay current interest on its mortgage bonds in order to prevent the trustees of the various mortgage bonds from entering upon and taking possession of the properties, and your honors can readily see from an inspection of the mortgages aforesaid that if said property is taken possession of by the various trustees in the divisional mortgages it will be segregated into three several parts, although the property of the same corporation.

25. Your orator further avers that it is remediless under existing conditions for the collection of what is due it, except through the interposition of this honorable court in its power to appoint a receiver of the whole property aforesaid, which said receiver shall be authorized to administer said property under the orders of the court so as to insure the safety and utmost efficiency in the earning capacity of said lines by an application of the current earnings

thereto, and to apply, under the orders of the court, the bal-
63 ance that may remain to the payment of your orator's debt and such other claims as may be similarly situated, or so much thereof as to the court may seem equitable, and that the said receiver have under his administration the whole of said line and maintain it in good condition and until such time as the rights of all parties can be heard and determined and the property placed upon a basis of meeting all the just and equitable demands against said company.

26. Your orator avers that it is not only the interest of this complainant, but of all other creditors of like grade, as well as a matter of vital interest to all of the lien creditors of defendant company, that a rec*i*ver shall be appointed for the purpose of administering said property as an entirety and not permit the same to go into the hands of the trustees of the divisional mortgages, and thus segregate the entire property of the said company, and your orator is advised and therefore avers, that the trustees of a majority of the mortgages upon the lines of the defendant company acquiesce in the appointment of such receiver, believing that the same will be to their common advantage and benefit, but that unless such appointment is made said trustees will respectively proceed to take active steps for the assertion of their legal rights to possession of the separate parts of said road or to foreclosure immediately on default in the interest on their bonds, which default will certainly take place at the approaching maturi*ng maturity* thereof.

Wherefore your orator, showing that it is a creditor of the Texas and Pacific Railway Company to the amount of $1,688,015.79 and additional sums to date not yet definitely ascertained, and that the same is *in* an equitable lien on all the earnings of said company and all its property and is secured by the said $2,000,000 issued
64 under the said general and terminal mortgage, and that the said Texas and Pacific Railway Company is an insolvent corporation owning 1,487 miles of road, with mortgages thereupon to the amount of $43,340,000 and interest whereupon it is unable to meet; that the line of road is out of repair and in so dangerous a condition that the said company cannot perform its duty as carrier with safety, expedition, and convenience to the public; that judgments have been obtained against said corporation under which the assets are liable to levy and sale; and whereas your orator has no adequate remedy at law, comes to your honorable court and prays that your orator have leave to make all of said trustees in the several mortgages hereinbefore named defendants hereto on their coming into the jurisdiction of this court, or in accordance with the practice and equity of said court, or that they have leave to become parties hereto in assertion of their rights and interests, and that all persons holding claims of like character with your orator may appear herein for their interests, and on the hearing of this cause for equitable relief, as follows:

First. That your orator be found to be a creditor of the Texas and Pacific Railway Company and the amount of the indebtedness to your orator be fixed and determined and its lien upon the earn-

ings and the property of the Texas and Pacific Railway Company be declared.

Second. That the amount of all claims upon the lines and other property of the Texas and Pacific Railway Company be determined and the priority and extent of their liens be declared.

Third. That your honorable court, by a master commissioner or such other officer as to you may seem proper, shall cause to be sold the railroad, franchises, and other property of the Texas and Pacific Railway Company for the purpose of satisfying the
65 claim of your creditors of the company as their interest may appear.

Fourth. That a receiver be appointed to take into his possession, custody, and control all the property, rights, and franchises, money, books, accounts, lands, and premises of every kind — description of the said defendant company or to which it has right in Louisiana and Texas and wherever situated, and to manage, operate, and maintain the lines of said defendant company, with authority to employ such agents and servants as may be necessary to preserve the property of the defendant company and keep it open as a public highway for the transportation and carriage of passengers and freight by steam power as aforesaid, and for the proper performance of and discharge of its business as a railway company.

Fifth. That an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining the Texas and Pacific Railway Company, its agents, servants, and employés, and all persons or corporations in any manner claiming under or through the said Texas and Pacific Railway Company, from obstructing or in anywise interfering with the receiver appointed by your honorable court in possession of the railroad and property of said company.

Sixth. General and other relief as may be appropriate in the premises.

May it please your honors to grant to your orator the writ of subpœna, to be directed to the said defendant, The Texas and Pacific Railway Company, thereby commanding it, at a certain day and under a certain pain therein to be mentioned, personally to be and appear before your honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, oath thereto being waived; and, further, to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall seem meet.

66 And your orator will ever pray, etc.

W. P. BALLINGER,
Solicitor and of Counsel for the Missouri Pacific Railway Company.

EASTERN DISTRICT OF LOUISIANA, }
City of New Orleans. }

I, William W. Finley, on — state that I am the agent of the complainant, The Missouri Pacific Railway, in the preceding bill; that I have heard the said bill read and know the contents thereof,

and that on my best knowledge, information, and relief the allegations therein contained are correct and true, and that I am authorized to make this affidavit.

(Signed) W. W. FINLEY.

Sworn to and subscribed before me this 15th December, 1885.

[SEAL.] T. McC. HYMAN,
Deputy Clerk.

Filed December 15th, 1885.

Decree Appointing Receivers.

THE MISSOURI PACIFIC RAILWAY COMPANY
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY. } No. 11181.

Now, on this the 16th day of December, 1885, comes on to be heard, upon the bill and exhibits of the complainant and upon the answer of the defendant, the application and prayer of the complainant, The Missouri Pacific Railway Company, in the above cause, for the appointment of a receiver to take into possession, custody, and control all the property, rights, and franchises, money, books, accounts, lands, and premises of every kind and description of the said defendant company or to which it has right in Louisiana and Texas and wherever situated, with power as therein prayed; and thereupon appeared the complainant and the defendant,
67 by their solicitors, and also appeared Richard C. Dale, Esq., of Philadelphia, Pennsylvania, solicitor, representing the Fidelity Insurance, Trust and Safe Deposit Company, trustees of the several mortgages in the said bill mentioned, and Walter D. Denegre and Bayne & Denegre, for certain land-grant bondholders, and others, represented by John R. Dos Possos, Esq.

And the said application having been considered by the court, it is now ordered, adjudged, and decreed as follows: That the prayer of the said bill be granted and Lionel A. Sheldon and John C. Brown be, and are hereby, appointed joint receivers of all the said railroads of the defendant company, both in Louisiana and in Texas, and of all the property of said company, with full power and instructions hereby to take possession, custody, and control of all the property, rights, and franchises, money, books, accounts, lands, and premises of every kind and description of the said defendant company, or to which it has right in Louisiana and in Texas, and wherever situated, and to manage, operate, and maintain the said lines of railroad of the said defendant company, with authority to employ such officers, agents, and employees and counsel as may be necessary to preserve and protect all the property of the defendant company, and to keep it open as a public highway for the transportation or carriage of passengers and freight by steam power, as aforesaid, and for the proper performance of its business as a railway company and a carrier, and to collect, as far as possible, all accounts, choses in action, and credits due to said company, acting in all things

under the order of this court or of such other courts as may entertain jurisdiction of parts of such property as ancillary to the jurisdiction of this court in this cause, the said receivers being
68 appointed subject to the right of all parties in interest to suggest other appointees or to show cause or make objection to the same, before me, on the 9th day of January, 1886, and to the orders which may then be made in the premises.

It is further ordered that the said receivers, out of the income that shall come into their hands from the operation of said railroad or otherwise, proceed to pay all balance due or to become due to other railroads or transportation companies on balance growing out of the exchange of traffic accruing during six months prior thereto.

That said receivers also pay in like manner, out of any incomes or other available revenue which may come into their hands, all just claims and accounts for labor, supplies, professional services, salaries of officers and employees, that had been earned or have matured within six months before the making of this court; also all taxes—State, county, and municipal—that may be or may become due on any of the property of said company; also the interest on the debt due the State of Texas as the same may become due.

It is further ordered that all parties, upon being informed of this order, proceed to surrender all the lines of said railroad and all the property, choses in action, and accounts of said company to said receivers, who, jointly and severally, are authorized and directed to take possession of the same at once, and the complainant is authorized to apply to any other United States circuit court of competent jurisdiction for such order in aid of the primary jurisdiction vested in this court in said cause as may have ancillary jurisdiction herein.

And it is further ordered that said receivers pay all current
69 expenses in the operation of said road, including just and proper claims for loss or damage to freight and baggage, and shall collect all the revenues thereof, and all choses in action, accounts, and credits due or to become due to the company.

That such receivers keep such accounts as may be necessary to show the source from which all such income and revenues shall be derived with reference to interest of all parties herein and the expenditure by them made.

And it is further ordered that said receivers report to this court from time to time their doings under this decree, and that they apply for instructions to this court when necessary.

(Signed) DON A. PARDEE,
Circuit Judge.

(Filed December 16th, 1885.)

Decree Confirming Appointment of Receivers.

THE MISSOURI PACIFIC RAILWAY COMPANY
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY. } No. 11181.

This court having, on the 16th day of December, 1865, appointed Lionel A. Sheldon and John C. Brown receivers in this cause, subject to the right of all parties in interest to suggest other appointees or to show cause or to make objection to the same on this day—

And the matter coming on to be heard upon said reservation, and after hearing John R. Dos Passos, Esq., of counsel for various bondholders, for the trustees represented by him, and Samuel Dickson, Esq., for the trustees represented by him, and there being no objection thereto presented to the court—

It is ordered that the said receivers, Lionel A. Sheldon and
70 John C. Brown, be, and they are hereby, confirmed in their appointment and continued as such, and that they give bond within ten days in the sum of fifty thousand dollars each, with good and solvent surety, to be approved by a judge of this court or by a special master in this cause.

It is further ordered that said receivers pass their accounts monthly before a special master to be appointed by the court in this cause.

DON A. PARDEE, *Judge.*

(Entered and filed January 9th, 1886.)

Order Accepting Resignation of Lionel A. Sheldon, Receiver, and Appointing John C. Brown Sole Receiver.

THE MISSOURI PACIFIC RAILWAY COMPANY
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY. } No. 11181.

Lionel A. Sheldon, one of the receivers herein, having tendered his resignation in writing, and the same having been placed on file—

It is ordered that said resignation be, and the same is hereby, accepted, and that upon the settlement of his accounts the said Lionel A. Sheldon be discharged from further responsibility of his trust.

It is further ordered that until the court shall otherwise order all the powers heretofore conferred upon the receivers in this cause, as well as in the various causes in this circuit to which said receivership has been extended, be, and the same are hereby, conferred on and vested in John C. Brown as the remaining and sole receiver.

71 November 30th, 1887.

DON A. PARDEE, *Judge.*

(Entered and filed November 30th, 1887.)

Answer of the Defendant.

THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation Incorporated under the Laws of the State of Missouri and a Citizen of said State of Missouri,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY, a Corporation Created by and Existing under Certain Acts of Congress of the United States.
No. 11181.

The answer of the Texas and Pacific Railway Company to the bill of complaint of the Missouri Pacific Railway Company.

To the honorable the judges of the circuit court *for* the United States for the eastern district of Louisiana:

The defendant, The Texas and Pacific Railway Company, for answer to the plaintiff's bill of complaint, or to such parts thereof as it is advised — or are material for it to answer unto, says:

1st. It admits to the corporate capacity of complainant and defendant and their respective residence as alleged.

2nd. The defendant admits that the facts alleged in paragraphs 1 to 19, inclusive, of the complainant's bill are substantially true as therein alleged and set forth.

3rd. It admits that the facts as alleged in paragraph 20 of complainant's bill are true, except as to the lien therein set up by the complainant for the indebtedness which it claims. Whether
72 it has such lien as claimed or in fact any liens defendant submits to the court.

4th. In answer to paragraph 21 of complainant's bill, defendant admits its road-bed is not in such condition as to enable it to discharge its duties to the public as promptly and faithfully as is its duty to do, and admits that its present condition results from its earnings not being sufficient to pay its fixed charges and maintain its track in proper condition. It also admits that it has applied its earnings, after paying operating expenses, to the amount of its fixed charges, to the neglect of a proper maintenance of its road-bed, as well as to the payment of the advances made by complainant.

5th. Defendant admits that paragraphs 22 to 26, inclusive, are true in substance, as therein alleged, so far as they allege facts. All questions of law arising therein, as claimed by complainant, defendant submits to the court.

Now, having fully answered, this defendant submits itself to such orders as to this honorable court may seem right and proper in the premises.

JAS. A. BAKER,
Solicitor for Defendant.
W. W. HOWE,
For Defendant.

(Filed December 15th, 1885.)

(EXHIBIT A.)

Filed with petition of receiver for discharge.

73 THE MISSOURI PACIFIC RAILWAY COMPANY
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Original and amended bills.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY and Others.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY and Others.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY and Others.

GEO. KRUMBHAAR and SAM'L M. FELTON, Trustees,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

In the above-named causes, pending in the U. S. circuit court in New Orleans, La., the parties have agreed that after the costs have been paid or provided for and the receiver has made his settlement with the court he shall be discharged and the causes dismissed, the Missouri Pacific Railway Company having received pay in full for its demands against the Texas and Pacific Railway Com-
74 pany, claim by its original bill.

It is further agreed that thereupon the property in the hands of the receiver shall be transferred to the Texas and Pacific Railway Company under its present organization, which company undertakes to protect the receiver, as well as the former receiver, against any unsettled contracts, liabilities, costs, and suits arising under or because of the receivership.

Approved as trustees of consolidated mortgage, Eastern division.

[SEAL.] (Signed) S. M. FELTON.
GEO. D. KRUMBHAAR.

Attests:

(Signed) A. H. CALEF, *Secretary.*

THE MISSOURI PACIFIC RAILWAY CO.,
By JAY GOULD, *President.*

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By JAY GOULD, *President.*

Atiest:

[SEAL.] (Signed) C. E. SATTERLEE, *Sec'y.*

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY,
By JOHN B. GEST, *Vice-President.*

Attest:

[SEAL] (Signed) R. PATTERSON, *Sec'y.*

Approved on behalf of the committee of reorganization May 4th, 1888.

75 (Signed) I. J. WISTAR, *Chairman.*

Approved as trustees income and land-grant mtg.

(Signed) C. E. SATTERLEE.
GEORGE J. GOULD.

Order on Petition of Receiver for Discharge.

THE MISSOURI PACIFIC RAILWAY COMPANY
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

In consideration of the foregoing petition and the facts disclosed by the record it is ordered by the court that an accounting be made by the receiver from the date of the last accounting to the first day of June, and at the coming in of which report, and it being found satisfactory and accepted, the remaining prayers of the petition will be granted by the court. In the meantime the receiver will continue to hold the property, under the orders of the court, until the first of June, 1888, at which time, if this order is not vacated, the railway and its property may be operated by the corporation under such orders as may be made by the court from time to time and under the supervision and control of the receiver, to the end that the property shall not pass beyond the control of the orders of the court nor of the receiver until the accounting takes place with the receiver and until he is fully protected by the corporation for causes of action originating against him and against the property pending the receivership.

In stating the account the receiver will, as heretofore, be charged with all assets which have come into his hands since the last settlement and credited with all expenditures and disbursements
76 made in due course of business under the orders of the court, and will also be credited with his allowances as compensation to him as receiver, — with the written statement of the reorganization committee, which statement it made up to the 1st of May instant; but an additional allowance, up to such time as he may be finally discharged, will be made in the same proportion.

New Orleans, La., May 16th, 1888.

(Signed) DON A. PARDEE,
Circuit Judge.

(Entered and filed May 31st, 1888.)

In the United States Circuit Court.

THE MISSOURI PACIFIC RAILWAY COMPANY *versus* THE TEXAS AND PACIFIC RAILWAY COMPANY.	No. 11181. Eastern Dist. of La.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY *versus* THE TEXAS RAILWAY COMPANY.	Eastern Dist. of La.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY *versus* THE TEXAS AND PACIFIC RAILWAY COMPANY.	Eastern Dist. of La.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY *versus* THE TEXAS AND PACIFIC RAILWAY COMPANY.	Eastern Dist. of La.

To the honorable the judges of the said circuit court:

77 Your petitioner, John C. Brown, as receiver of the Texas and Pacific Railway Company and its property in the above entitled and numbered causes, represents that heretofore it has been made to appear to the court that the object and purposes of all the bill- in these causes have been accomplished by settlement and agreement of the parties and evidence of that fact filed as part of the record.

That, on it being so made to appear, the court ordered him to render his accounts as receiver up to the first of June, which has been done, and it has been examined and approved, and since that date petitioner had kept his account as with the company. By the same order he was directed to hold the property under the orders of the court until the first of June, 1888, at which time, if said order was not vacated, the railway company might operate the road under such orders as the court might make from time to time and under the supervision and control of the receiver. No formal delivery of the road and property in his hands has been made to said railway company, and petitioner now asks that he be allowed formally to deliver all property and funds in his hands as such receiver to said railway company, and that he be allowed to account to said company according to his account filed up to the first of June, and for all receipts and expenditures by him received and made since the first of June.

He has carried over on the present books of the company the cash balance and all other balances of property and assets as found in his hands by his report to the first of June aforesaid, and he is now the president of said railway company, and after his discharge will be in possession of all said company's road, property, and funds as such for said company. Wherefore he asks that he be discharged

from his said receivership and that his bond as receiver be
78 vacated and annulled on payment of all costs legally taxable; but he prays the court to make such order as will charge the property so turned over in the hands of said railway company and its assigns with all liability for which he, as receiver, is or might be held personally liable.

Your petitioner further says that the sum of his compensation as receiver has been agreed on by the parties in interest and is satisfactory to him and has been settled up to the 31st day of October, 1888, at which time he asks that his discharge take effect.

(Signed) JOHN C. BROWN.

Filed October 26th, 1888.

Order on Petition of Jno. C. Brown, Receiver, for Discharge.

THE MISSOURI PACIFIC RAILWAY COMPANY
versus
THE TEXAS AND PACIFIC RAILWAY COMPANY. } No. 11181.

On consideration of the foregoing petition, it is now ordered, adjudged, and decreed that the prayer of the same be granted; and, accordingly, that Jno. C. Brown, receiver of the property of the Texas and Pacific railway in the above-entitled causes, be, and is hereby, directed to make delivery unto said Texas and Pacific Railway Company of all property, funds, and assets in his hands *of* such receiver, and that he — directed to account to said company according to his account filed and approved up to June first, 1888, and for all receipts and expenditures by him received and made since the said first June, 1888. Such delivery will be made as of Oct. 31st, 1888.

It is further ordered that said receiver be finally discharged on said 31st October, 1888, from his receivership on payment of all costs legally taxed, and that thereupon his bond be vacated and cancelled.

It is further ordered that said property, nevertheless, shall
79 be delivered to and received by said Texas and Pacific Railway Company, subject to and charged with all traffic liabilities due to connecting lines and all contracts for which said receiver is or might be held, made, or in any way liable, and subject, also, to any and all judgments which have heretofore been rendered in favor of intervenors in this case and which have not been paid, as well as to such judgments as may be hereafter rendered by the court in favor of intervenors while it retains the cases for these determinations and interventions now pending and undetermined or which may be filed prior to February, 1889, together with needful expenses of defending said claims, and upon the condition that such liabilities and obligations of the receiver when so recognized and adjudged may be enforced against said property in the hands of said company or its assigns to the same extent that they could have been enforced if said property had not been surrendered into

the possession of said company and was still in the hands of the court, and with the further condition that the court may, if needful for the protection of the receiver's obligations and liabilities so recognized by this court, resume possession of said property.

The bills in these clauses will be retained for the purpose of investigating such liabilities and obligations and for such other purpose as may seem needful. It is ordered that all claims against the receiver as such up to said 31st of October, 1888, be presented and prosecuted by intervention prior to February 1st, 1889, and if not so presented by that date the same be barred and shall not be a charge on the property of said company.

It is further ordered that the said receiver advertise in a daily newspaper in New Orleans and in Dallas the fact of his discharge and a notice to said claimants to make claim within the time aforesaid, to wit, before the 1st of February, 1889, and that he
80 post a printed notice of similar purport in the station-houses of said railway.

New Orleans, October 26th, 1888.

(Signed) JNO.* A. PARDEE,
Circuit Judge.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing (46) pages contain and form a full, complete, and perfect transcript of the—

Bill of complaint;

Decree appointing receiver;

Decree confirming appointment of receiver;

Order accepting resignation of Lionel A. Sheldon and appointing John C. Brown sole receiver;

Answer of defendant;

Exhibit A, filed with petition of receiver for discharge;

Order on petition for discharge, entered May 31st, 1888;

Petition of receiver for discharge, filed October 26th, 1888;

Order on discharge, filed October 26th, 1888—

In the case of The Missouri Pacific Railway Co. *versus* The Texas and Pacific Railway Company—

No. 11181 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 23rd day of January, A. D. 1889.

[SEAL.] E. D. HUNT, *Clerk.*

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* Should be "Don."

81 The plaintiff read in evidence the deposition of JOHN C. BROWN as follows:

1st. My name is John C. Brown, and I am at present engaged in railroading as president of the Texas and Pacific Railway Company. My business is at Dallas, Texas. During the years 1887 and 1888 I was receiver of the Texas and Pacific railway.

2. I ceased to act as receiver of the Texas and Pacific railway on the 31st October, 1888, under the order of the court in the case of The Missouri Pacific Railway Company *vs.* The Texas and Pacific Railway Company, in the United States circuit court of New Orleans.

3. When I was discharged as receiver I was directed to turn over the property, money, funds, and assets of the railway to the corporation known as the Texas and Pacific Railway Company. This occurred about the 31st of October or about the 31st of Nov., 1888. This, as stated before, was under the orders of the United States circuit court, by which court I was appointed receiver. Said property was under the control of the court in 1887 and 1888, and I managed the same by orders of said court made in this cause from time to time.

Answers to Cross-interrogatories.

1. I was neither an officer, director, nor stockholder of the Missouri Pacific Company on the fifteenth of December, 1885, and cannot recall if I never knew the names of all of them. J. Gould was president, Mr. Calef, of New York, was treasurer and secretary, and I think Mr. Hoxie was vice-pres. I cannot remember the names of all the officers at that date.

2. J. Gould was president of the Texas and Pacific at the time specified. I was one of the vice-presidents, and tendered my resignation at the time I was appointed receiver. Jay Gould, Russell Sage, A. I. Hopkins, George J. Gould, and others whose names I do not remember were directors at that time.

3. The officers of the Texas and Pacific Railway Company
82 at this date (February 23rd, 1889) are John C. Brown, president; George Gould, vice-president; C. E. Satterly, secretary and treasurer, and the same parties are directors, as well as Russell Sage, W. C. Hall, of Louisville, Ky.; I. J. Wistar, John Marcoe, and Mr. Winsor, of Philadelphia; George B. Roberts and Mr. Hutchinson, of the same place; Samuel Sloan, C. M. McGhee, A. I. Hopkins, of N. Y.; Jno. Wright, of Phila.; Rob't Flemming, of N. Y., and S. H. H. Clarke, of St. Louis. The local treasurer is Guy Sumpter, and the auditor is Richard Fenby. Wm. H. Abrams, of Dallas, is assistant secretary.

4. I was not present at any agreement or understanding between the railroad companies mentioned, and if any was made I have no knowledge of it. The attorneys of the Texas and Pacific railway were present at the time the order was granted, as I am informed, and the company filed its answer (but I did not answer myself nor sign the answer of the company), and that answer is on file, I sup-

pose, with the papers in the case of The Mo. Pac. Co. *vs.* The T. & P. R'y in New Orleans, in the U. S. circuit court for the eastern district of La., and will show accurately what it contains, which I am not able to state from memory.

5. Large sums of money were expended by me and by my co-receiver in the betterment and improvement of the property of the railway. These sums were derived partly from receipts and the income arising from the use, operation, and management of the railway and partly from contributions of ten per cent. made by stockholders who were the holders of full-paid certificates of stock—about an equal amount from each source. The amounts and character and improvements and betterments were about 700 new steel rails to replace old worn-out and no longer serviceable iron rails, costing about two and a half millions of dollars; purchasing and putting in
83 new ties to replace old and worn-out ties, over three-quarters of a million dollars; new locomotives and fixtures, costing about a quarter of a million dollars; new freight cars, amounting to over
(2)
$400.00; new side tracks, nearly $120,000; ballasting on the New Orleans division, about $400,000; raising track on that division, about $180,000; widening embankments, filling trestles, ballasting, etc., about $170,000; labor laying steel rails and cost of fastenings for same, about $300,000, besides a great many other items too tedious to mention, amounting in all to about five and one-half millions of dollars. All these expenditures were made under the orders of the court and many more also, as I have said, too tedious to enumerate and made after the court became satisfied that they were necessary for the safe and proper conduct of the business of the road, both in reference to its own economic operation and to meet the demands of the commerce of the country. Said orders will all be found, I presume, on file in the records of the said court.

6. After the filing of the bill by the Mo. Pac. R'y Co. and the appointment of the receiver as aforesaid bills were filed in the same court by the trustees on all the mortgages to secure the outstanding bonds issued by said company, being four or five suits in number. The causes were virtually consolidated, and the decree and order in all of them ordered the foreclosure of the mortgage and the sale of the property. The property was offered for sale, in accordance with such decree, and the bids received and returned to the court, but before the period arrived under the rules of the court for confirming the sale three classes of bondholders agreed among themselves to cancel the former mortgages and bonds issued thereunder and make new bonds bearing a lower rate of interest in lieu of the bonds so surrendered, and the income and land-grant bondholders agree-
84 to take the lands and a certain amount of bonds and to surrender and to have cancelled therefor their income and land-grant bond-. The property was not turned over to the reorganized company only as stated in my examination-in-chief, and I had no express understanding or agreement or any other understanding or agreement with the company as to its liability to me for any sums of money recovered against me by reason of my receivership, either

verbally or in writing. My only protection was that afforded by the order of the court discharging me as receiver, with which I am perfectly content.

7. The reports made by me and my coreceiver were made to the U. S. circuit court for the eastern district of La., in the city of New Orleans, in the case already mentioned, passed upon and filed in such case, and had become part of the record of the court.

8. My accounting was made with the court and under the orders of the court up to the date of my discharge, and is shown by the records of said court. I have no knowledge of any agreement made between me as receiver and the Texas Pacific Railway Company as now existing or as it existed on the 31st day of October, 1888.

9. I have no agreement or settlement or promise or adjustment between the Mo. Pac. R'y Co. and the T. & P. R'y Co. and myself, nor was I a party to any such agreement, adjustment, or settlement.

10. I was not party to any agreement between the Mo. Pac. R'y Co. and the T. & P. R'y Co., plaintiff and defendant in said original bill, but it is no doubt a fact that such a settlement and agreement between them was made, and I have no doubt it — a fact that all parties interested consented to same; but I have no such paper, and no such paper is accessible to me more than the parties to this suit, for I presume, although I do not know the fact, that it is on file in the records of this case in New Orleans. I have no papers or agreement between such parties and myself as receiver, and therefore cannot produce copy.

85

11. There is no understanding or agreement between me as receiver and such parties as above stated. As a fact there is no such agreement or understanding between said railway company and myself.

Plaintiff rested.

J. J. CONNER, for the defendant, testified:

I am foreman of the locomotive department of the Houston and Texas Central railway; was 33 years old last October 16th; have been engaged as foreman three years the 20th of this month, in Fort Worth. I have been in the locomotive business and machinest for about twelve years. In my present position my duty is to notice engines to see that they are all right, and any reports of engineers, anything the matter with them, to see it is attended to.

Q. Suppose an engineer should come in and claim that there was anything the matter with a coupling or pin or anything of that sort, to whom would he make that complaint?

A. He would make it to me and I would superintend it and see it was done, if it was necessary to be done. I do not know engine 153, upon which this accident is alleged to have occurred. I am acquainted with the Mogel engines; have noticed them considerably. We have a round-house down here where we bring in our engines when they come in. As to the proportions of engines on our road which have slots and keys in the coupling pin of the engine, that is something we don't pay much attention to. Sometimes a pin has a key

or might have a slot. We don't pay much attention to it be-
86 cause we don't consider it unsafe without it. I never knew one ever working out in my life; never heard of a pin on an engine coming out and allowing the engine to come uncoupled. Prior to this accident I do not remember examining any engines of the Texas and Pacific railway; never paid any attention to the engines of the other roads to see whether they had slots and keys or not. I know how it is on our road, and have noticed many of those T. & P. engines passing back and forth on the yards there and never noticed any slots and keys. The doors on those hog engines I have noticed around on the T. & P. are, I should judge, eleven or twelve or thirteen inches from deck roof. The deck is level with the pin and the door is up, say, twelve inches. The pin is back of the door. There is not much space on that engine because the boiler head comes right back there. I don't think there is more than 12 inches space. I never paid any attention to that. As a general thing our pins stick down three or four inches, maybe sometime five inches or more, from the end of the pin. These castings on those engines are about three inches through here (the portion below the drawbar); then the drawbar is generally two or two and a quarter; that would be about five inches and a quarter. If the pin descends four inches below the casting, it would have to rise up nine inches and a quarter before it would let the drawbar out. If the door was open at that time and 12 inches high, the pin would be only three inches below the bottom of the door. The light would be very apt to strike it if it was up within two or three inches—that is, provided the pin reached down here, as I say, three or four or five inches long. I don't know anything about that one. We have on our engines just the same kind of couplings as this. Our pins average about 2 inches diameter. On these engines we
have—they are considered small engines, 16 by 24 engines—
87 them stay-chains are made of $\frac{7}{8}$ iron. There is a difference in the construction of the chain fastenings. We have a hook that goes along on the tank here, and there — a couple of three-quarter bolts here and a hook turned up to hook that chain on; then there are others where there is a kind of an eyebolt through there and put a pin through with a split key to hold the chain up. On those engines the chains are generally made of about $\frac{7}{8}$ iron, but on these ten-wheelers they are inch or inch and a quarter.

Q. On engines where there are inch or inch and a quarter iron chains, about what is the size of the bolts and how many do you have where the chain hooks on?

A. I was talking of the smaller class of engines. That I never did pay any attention to, whether they had two bolts or one. They most likely have a $\frac{7}{8}$ bolt, an engine of that size; not less than $\frac{7}{8}$ bolts. The engines I have examined on the T. & P., these Mogul engines, are not more lightly constructed as to the coupling apparatus than the engines on our road.

On our road, with 16 by 24 engine, the stay-chains are about $\frac{7}{8}$, but I suppose an engine of that size it would be about an inch or inch and an eighth with about a $\frac{7}{8}$ bolt. On our engines where the

chains are $\frac{7}{8}$ the bolts are $\frac{3}{4}$. There are two bolts to hold what one $\frac{3}{4}$ will break. The way ours are constructed the chain fastens into a hook. I think those hog engines ought to have $\frac{7}{8}$ bolts to make them safe, with an inch or inch and eighth chain. I guess they have two bolts in them; two $\frac{7}{8}$ bolts. One bolt would hardly be enough, with an inch or inch and eighth chain, provided there is no other contrivance to hold it. I think I said in answer to defendant's counsel that the fire-door was about twelve inches above the deck; I had never measured; never paid particular attention, but if such was the case and the bolt should rise nine inches the top of the bolt would be within three inches of the door;
88 would be three inches below the door. If the pin was just long enough to go through and not long enough to put in a key, certainly it would take that much less to get it out.

Redirect examination:

Two three-quarter bolts ought to hold an inch or one inch and a half.

Recross-examination:

Of course, it would be a little safer to have a slot and key in the pin than to have none; be harder to get out; of course, a little more safer. It would not jump up; but I don't see any possible chance for a pin that large getting out. If it did get out, of course, if it had a key through, it would not have got out unless they took the key out and pulled it out. If it came out the chain might hold just the same as the drawbar. There are often jerks that br-ake things like that; undue strain. If it did br-ake these bolts or jerk them out it was due either to the wood being defective or the bolts being defective, provided there was no undue strain on it.

Redirect examination:

I never heard of a pin jumping out in a case of that kind.

Deposition of L. W. Cannady, Read in Evidence by the Def't.

I was conductor on the train at time Charles Gay was killed. When we had arrived within about a mile or a mile and a half of Aneta station the engineer called for brake, and the rear brakeman and myself at once set brake and brought train to a standstill. I then went forward to engine and found the train broke loose from engine. Race, engineer, said engine had broke loose, and the fireman had gone down on track and he was afraid he was killed. Hoover, the front brakeman, had at this time gone forward to Aneta station. I and rear brakeman went back and found body of Gay some distance in rear of caboose on the track, mangled,
89 and life was extinct. I do not remember to have seen or picked up either Gay's hat or his shovel; the rear brakeman and I picked up the body and we two placed it in the caboose, and when another engine had come brought it to station and it was returned to Fort Worth on passenger. I do not know where either

of the breakeman now are. Hoover left here and quit the service soon, some time after the accident; have never seen or heard of him since. At time the break-s were called for train was going up a slight grade, with a full loaded train of cars, about sixteen in number, and running 15 or 20 miles an hour. We stopped train as soon as possible after whistle sounded. I am now working for the Gulf, Colorado and Santa Fee Railway Company.

Deposition of G. W. Deats, Read by the Defendant.

My name is G. W. Deats; age, 32 years; residence, Fort Worth; am general foreman T. & P. shops; residence and occupation the same at the time John M. Gay was killed and have been since June, 1887; have worked on Deleware, Lackawana and Western R. R.; Penn. R. R., O. & M. R. R., and the T. & P. R'y in Texas; have worked foreman and in the shops, locomotive engineer, and traveling engineer. I know the condition of engine and tender in question. They were both in good condition; the drawbar was coupled to two castings and the tail-piece of the engine; the casting on the engine was bolted to the tail-piece with eight bolts, four at bottom and four at top, and the drawbar pin went through the tail-piece and casting and extended four and one-half inches below the tail-piece; the casting on the tender was bolted on the center or draft sills with six bolts. There were two long draft-rods run from front of tank casting to casting on the rear end. The front end of each check-chain was coupled to tail-piece with one bolt or pin, which was about one and three-eight-s inches thick, finished; the rear end of each check
90 or stay chain was coupled to a hook, which was fastened to the tender with two ⅞-inch bolts, which bolts went down through the tender; there were two of said chains and they were made of 1¼-inch iron rod.

3. The pin was nineteen inches long and extended four and one-half under tail-piece of engine. Said pin weighed between eighteen and twenty pounds. It was in no way different from the pins used on that class of engines anywhere at that date that I know of. All engines of this class used the same pin and coupling. A great many of the T. & P. engines had them and 90 per cent. of the M., K. & T. engines running in here used that coupling and pin.

4. The usual manner of coupling this class of engines was in the same manner this one was coupled. Some engines are now coupled with a slot and key additional. My experience had been and my opinion at that time was that they were equally as safe without slot and pin as with them.

5. I never heard of such an accident before this one.

6. The pin would raise ten and one-half inches above the tail-piece. In this class of engines there is no cab floor where pin goes through. There is a thin piece of plank fitted in above the tail-piece, so as to make the tank and engine come level.

7. If the pin should rise so as to allow the drawbar to uncouple, the pin would be an inch or two above the bottom of fire-box door and directly in front of it.

8. The pin would be under the fireman's shovel, if he did not hit it when shoveling in coal. He would be liable to hit it with his shovel.

9. The stay-chains were each of them made of 1½-inch round iron. The front end of each chain was coupled to engine with a 1⅜ finished bolt. The rear end of each was fastened to a hook
91 and the hook was fastened to the tender by two ⅞-inch bolts which went down through the end sill. They were in good condition and had been examined that day. S. V. Singleton uncoupled this engine and took the drawbar and pins to the blacksmith shop to have the lost motion or slack taken out between the tank and engine, and W. G. Dehn done the blacksmith work that was done on them and Mr. Singleton coupled the engine together.

10. Some engines do not have hook on tender, and some of them have one bolt run through the end sill with an eye in it to hold the stay-chain—bolts from one inch to one and one-fourth inches in diameter.

11. The bolts of the engine in question were of the same kind and size that were placed by the manufacturer.

12. No change had been made, because we considered them perfectly safe as they were.

Answers to Cross-interrogatories.

1. I am general foreman of the T. & P. shops, and was in January, 1888, on the T. & P. road.

2. I was a witness on the former trial of this case.

3. The engine and tender in question was coupled by drawbar and two pins and two chains.

4. The front end of drawbar is coupled to rear end of engine by a pin which goes through tail-piece and casting on rear end of engine. The rear end of drawbar is coupled to casting in front end of tank. The front end of each stay-chain is coupled to tail-piece with one 1⅜ finished bolt. The rear end of each stay-chain is coupled to a hook, which hook is fastened by two ⅞-inch bolts going down through end sill.

5. The chain is called a safety or check chain, and is put
92 there for the purpose of holding the engine and tender together in case the drawbar or pins of castings break. I did not, to my knowledge, say that the safety chains held the engine and tender together.

7. The engine and tender when coupled would come apart 4 inches if held by the chains, the pin coming out.

8. A man could not fall through between engine and tender unless he was outside of apron or if there was no apron on engine.

9. I don't know of my own knowledge what caused the accident.

10. ——.

11. I do not know whether there was a slot and key put in that pin or not at time or before she went out on her next trip.

12. If there had been slot and key in pin at the time of the accident it would not work up. The head might have broken off

and the pin fell through, and the drawbar might have broken; the pin might have broke in rear end of drawbar where it went through casting in end of tank; tank casting might have broke; tender casting might have pulled off from tender; tail-piece might have pulled off said engine; the end might have pulled out of drawbar.

13. We might have had a few pins with slots and keys at that time, but none that I knew of in person.

14. The engine in question had been in use about ten years.

15. I don't think a pin any safer with slot and key. There are numerous ways in which an engine can come uncoupled. The bolts that went through hook on end of tank broke. The sudden jar probably broke bolts.

93 16. I had seen engines with a hole and ½ or ⅝ inch round key. They were ⅞ bolts that the safety chain was connected with, two in each hook. I do not remember testifying that they were ¾ bolts.

17. I presume the safety chains were put on this engine by the Rogers locomotive works; do not know exact age of pin nor whether the pin came from shop with engine or not, but the company had been using it.

18. It is a fact, as far as my knowledge, that this was the first time Gay ever went out to work on this engine.

19. This was a large engine, called a Roger Mogul. Some people call them a Roger hog for a nickname, but the proper name is Roger Mogul. It had not been in the shop in this place except for light running repairs.

Deposition of S. V. Singleton, Read by Defendant.

My name is S. V. Singleton; age, 36; and residence, Fort Worth, Texas. I lived in Fort Worth in January, 1888, and was the round-house carpenter of the T. & P. at Fort Worth and had been so engaged over four years. In 1878 I worked on the Richmond and Danville road; afterwards the E. T., V. & G., Georgia Pacific, Anderson car works, C., A. & N. and T. & P. railroads. I did some carpenter-work on all of these roads; most of my time was so engaged.

2. I coupled the engine and tender in question together and considered the coupling apparatus safe and in good condition. I had previously disconnected the engine and tender in order to find the lost motion, and after they were put in repair I connected the engine and tender. I only disconnected and connected once.

3. The forward pin was two inches diameter, 19½ in. long; extended through the tail-piece of the engine—4½ inches below tail-piece of engine. Back pin in tank, I think, was about 22 in. long,

94 2⅛ or 2¼ in. diameter. The size of bar was about two and a half ft. long, about 2 by 3 or 3½ in. The chains are fastened to the engine with bolts 1⅜ in. diameter in each chain. The chains are made of 1½-inch round iron and are fastened to a hook 1½ — fastened to tank with two bolts, each *each* ¾ or ⅞ inch. These

bolts go down the end sill of tank. Most of Rogers' Mogul engines are connected like this one. I think the M., K. & T. is the only road in Fort Worth that uses these engines besides the T. & P.

4. All the others use a different chain. Some of the chains are made of 1-inch round iron and some are made of 1⅛-in. round iron. Most of these engines have eyebolt and chain welded into it. This eyebolt goes through end sill of tank and fastened on the inside with a nut. There is a pocket in cast-iron deck of engine. This chain is thrust into said pocket. There is a pin running down through cast-iron deck and pocket through link of chain; don't know why they were without slots. I have been working with engines about five years, and think they are safer with slot and pin.

5. I never heard of such an accident before as the one in question.

6. If the pin on this engine should rise so far as to allow the engine and tender to become uncoupled, the pin would rise about five inches from fire-door and from one to 3½ in. above the bottom of fire-door, and would rise about 9½ or 10½ in. above board that covered tail-piece.

8. It would be directly under fireman's shovel, and he would be liable to strike it in throwing coal into engine.

9. I have stated size of bolts, etc., in my answer to third and refer to it. Said engine, chains, &c., were examined on day of accident by me, S. V. Singleton. They were in good condition.

95 10. The stay chains and bolts were about the same as on other engines of this class.

11. Cannot say whether stay chains and bolts had been placed on engine by the defendant or by the manufacturer.

12. I suppose no change had been made because they considered the chains and bolts large enough.

Answer- to Cross-interrogatories.

I am round-house carpenter for the T. & P. R'y Co., and was at the time of this accident, at Fort Worth.

2. I was a witness on a former trial of this case.

3. Engine No. 153 at the time of this accident was coupled to the tender by drawbar and chains.

4. There are two tail-pieces on end of engine. There is a pocket fastened between these two pieces. The drawbar is thrust into this pocket in tail-piece and the pin goes down through tail-piece and pocket and end of drawbar. There is a heavy casting fastened to center sills of tank by six bolts running through casting up through center sills of tank; two draft-rods running through this casting and through casting on rear end of tank. This casting has a pocket in which this drawbar is thrust and a pin running down through casting and drawbar. The chains are fastened to engine with 1⅜ bolts each. The chain runs from engine back to tank; fastens to a hook. This hook fastens to end sill of tank with two ¾ or ⅞ in. bolts each.

5. The pin and this safety chain are used for the purpose of preventing the engine from coming uncoupled from the tender.

6. The safety chain is put there for the purpose that if the pin should break or drawbar break or casting pull off or if, from
96 any accident, the coupling should part these chains are intended to hold them together.

7. If the engine comes apart by reason of the pin coming out and if held by the safety chain, it would come about 3½ or 4 inches apart.

8. If the safety chain held the engine, I do not think it would come apart enough for a man to drop through, for there is an apron over it to cover the space.

9. I don't know of my own knowledge how the accident happened.

10. There was not a slot and key to this pin that should have held the engine and tender together.

11. The purpose of a slot and key is to keep the pin from working up.

12. The slot and key would have prevented the pin working out. The engine might have become uncoupled in other ways.

13. I don't think I testified on a former trial of this case that if there had been a slot and key in this pin it would have prevented the tender and engine from coming apart at the time of this accident. We try to use slots and keys in all our pins now.

14. I don't know how long this engine had been in use.

15. It is safer with a slot and key. The pin can't work up, but the engine could come uncoupled in other ways. I suppose the chain did not hold the engine and tender together because the bolts were not strong enough.

16. I never had paid any attention to slots and keys before this. The safety chains were connected to engine by 1⅛ belts; to the tank by ⅞ or ⅞ in. bolts; don't know how I testified on former trial. I intended to say a ⅞ or ⅞ in. bolt.

17. Don't know who put chain on engine or where pin came from, whether from shop or not. The pin had been used by company.

97 18. I believe this was the first time Gay went out to work on this engine.

19. I believe that this was an old engine; it was a large engine; don't know how many times it had been in the shop for repairs.

Deposition of W. G. Dehn, Read by Defendant.

My name is W. G. Dehn; age, 27 years; reside in Fort Worth, Texas; am a railroad blacksmith on the T. & P. at Fort Worth; was engaged in the same capacity at the time of the accident by which Gay was killed and had been for two years; have worked for the H. & T. C. and St. Louis Narrow Gauge Trans-Continental at Sherman; have been engaged in railroad blacksmithing and motive power for 14 years.

2. The coupling apparatus on the engine in question was in first-

class condition. I had worked on it just before the engine went out on the trip on which Gay was killed; don't know condition of machinery on engine.

3. The drawbar was 2 by four inch bar, two-inch pin on tank end. The pin was 20 inches long and weighed about 20 or 22 pounds; it projected four inches below tail-piece of the engine. The stay-chains were first class and made of 1½ round iron, fastened with hook on tank and a bolt in the tail-piece of engine; the rear bolts were two to each hook and were ⅞-in. bolts; the front bolt was 1⅜ finished; it did not differ materially from any other coupling at that time; as far as I know, all roads at that time used the same coupling apparatus.

4. The usual coupling was the same as the engine in question had. It was never thought necessary to use slots and keys. I have had experience for 14 years in the motive department of railroads and a part of my business has been repairing engines, and I
98 never heard of an accident of this kind before, nor did I consider it necessary to use a slot and key at that time.

5. I have heard of no other accident occurring by pins rising up and engines coming uncoupled from the tender, as this is alleged to have done.

6. If the pin on this engine should have arisen so far as to allow the link to slip out and the engine come uncoupled, it would have to come up ten inches above cab floor.

7. It would stand directly in front of fire-door and six inches from door and directly under the door.

8. The shovel would pass directly over the pin when the fireman shoveled in coal, and his left foot would be near the pin.

9. The stay-chains and bolts which held engine and tender together were in good condition. The chains were made of 1½ round iron. The front bolts were 1⅜ finished bolts, and the rear bolts were two to each chain and were ⅞ bolts. They were examined just before engine went out, and I saw myself that they were in good condition.

10. They did not differ materially from bolts and chains on other engines of that class.

12. Don't know who put those bolts and chains on the engine, but suppose they were the same as came on the engine.

13. I know that the coupling apparatus was in first-class order when the engine went out on that trip, and I had worked on it that day.

Answers to Cross-interrogatories.

1. Am railroad blacksmith in round-house for the T. & P. Co. at Fort Worth, and was the same at date of accident.

2. I was a witness on former trial of this case.

99 3. The engine and tender in question were coupled together by drawbar and safety chains.

4. The drawbar and pins connect the engine and tender and hold them together, and also the safety chains in case of an accident.

5. The safety chains are not used to hold the engine and tender

together only in case of an accident. It is called a safety chain for that reason.

6. The safety chain is put there for the purpose of keeping engine and tender together in case of accident. I did not testify on former trial that the safety chains held the engine and tender together. It is only put there in case of accident.

7. If the engine should come apart by reason of the pin coming out, the engine and tender would come about 6 inches apart if held by the safety chains.

8. If the safety chains held the engine, it would not come far enough apart for a man to drop through.

9. I don't know of my own knowledge why this accident happened.

10. There was no slot and key to the pin that held or should have held the engine and tender together.

11. The purpose of slot and key is to keep pin from working up; do not know whether a slot was put in this pin or not.

12. A slot and key might have prevented the pin from working up, but the engine and tender could have come apart in several ways other than the front pin coming out.

13. I did not upon former trial of this case testify that if there had been a slot and key in this pin it would have prevented the tender and engine from coming apart at the time of this accident. We did not have slots and keys in any pins at that time. We use slots and keys now on all engines.

100 14. Don't know how long this engine had been in use or *or* how old it was.

15. It is not safer with slot and key. It can come apaprt in many other ways. I don't know chains and bolts did not hold engine and tender together.

16. I had not heard of slots and keys being used prior to this accident. The size of front bolts was $1\frac{3}{8}$ finished and the rear bolts were $\frac{7}{8}$ in. bolts. I did not testify on former trial that they were $\frac{3}{4}$ bolts.

17. The engine came here with the chains on. It was an old pin; it came with the engine.

18. Don't know that this was the first time that Gay ever went out to work on that engine.

19. It was a hog engine. I don't know the age of the engine or whether it had been in often for repairs.

Deposition of S. M. Dillon, Read by the Defendant.

My name is S. M. Dillon; age, 28 years; am locomotive fireman; residence, Fort Worth; have been so engaged since 1877; have been in motive department nearly all the time.

2. If a full train going up a slight grade should be pulled by a hog engine coupled by a pin 19 inches long next to engine—the pin weighed 18 or 20 pounds—I do not believe pin could rise up under such circumstances and allow engine to come uncoupled.

3. My opinion is that a hog engine could not come uncoupled

under the circumstances indicated in former answer, by said pin rising or working up.

4. The pin would have to rise nine inches at least before the drawbar could slip out. The head of the pin would be exactly in front of fire-door and about even with it.

101 5. If the pin should rise as above indicated and the fireman should be putting coal in engine, with fire-door open, the pin would be right before him and he could not fail to see it day or night. The pin would be directly under the shovel, if he did not hit it, and he would be very apt to hit it.

6. I have heard of two or three engines breaking loose from tank.

7. On approaching a siding is the only time when front brakeman has to go forward to engine.

Answer to Cross-int's.

1. If coupling pin had a slot in lower end and a key in said slot, it would be impossible for pin to work up unless key broke.

2. If the stay-chains holding engine and tender together were strong and sound enough to hold the engine and tender together after the pin should work out, the tender and engine would not separate far enough to let a man fall through.

3. The stay-chains are put on engine to prevent engine and tender from parting when drawbar or pin breaks.

4. At the time Gay, plaintiffs' husband and father, was killed I was a locomotive fireman, engaged on the T. & P. R'y; am now at work for same company at Fort Worth, hostlering.

5. I have never testified before in this case. No one is present while my answers are being taken except the notary.

Deposition of J. Johnson, Read by Defendant.

1. My name is J. Johnson; age, 29 years; residence, Fort Worth; am freight conductor; have been so engaged six years; have worked as brakeman and conductor about 13 years; have fired some also.

2. If a full train going up a slight grade should be pulled by a hog engine coupled by a pin 19 inches long next to engine, and pin weighed 18 or 20 pounds, I do not believe pin could rise up and allow engine to come uncoupled.

3. I do not think a hog engine could come uncoupled under
102 the circumstances indicated in former answer, by said pin rising or working up, and in all my experience I have never known it to happen before.

4. The pin would have to rise eight or nine inches, at least, before drawbar could slip out, and would be directly in front of fire-box door.

5. If pin should rise up as indicated and fireman should be putting in coal in engine, with fire-door open, the pin would be right in front of fireman, and he could not help but see it. It would be directly under his shovel, if he didn't hit it.

6. I have never heard of but this accident occurring by pin coming out.

7. The front breakeman goes foreward to the engine only when we are taking siding or doing work at a station.

Answers to Cross-interrogatories.

1. If the coupling pin had a slot in the lower end and a key in said slot, it would not work up so as to permit the engine to leave the tender.

2. If the stay-chains holding the engine and tender together were strong and sound enough to hold the engine and tender together after the pin should work out, the tender and engine would not separate far enough to let a man fall through.

3. Stay-chains are put on an engine and tender in case pin should give way to keep engine and tender from separating.

4. I was working as conductor for T. & P. on west end at time of this accident; am now in same position and on same division.

5. No one is present except the notary while I am giving this deposition; have never testified before in this case.

Deposition of Chas. Curry, Read by Defendant.

My name is Chas. Curry; age, 23 years; reside at Cisco;
103 occupation, telegraph operator; have been engaged in said occupation about five years; have only worked in telegraph department.

6. I have never heard of any but this accident occurring by this pin coming out.

7. Front breakeman goes forward to engine only in case of throwing switches or approaching station.

Answers to Cross-interrogatories.

1. If coupling pin had slot in the lower end and a key in said slot, I don't see how it could work up so as to permit the engine to leave the tender.

2. If the stay-chains were strong and sound enough to hold the engine and tender together after the pin should work out, the tender and engine would not separate far enough to let a man fall through.

3. The purpose of the stay-chains is to keep the engine and tender attached, I presume.

4. At the time Gay was killed I was operator at Cisco for T. & P.; am now working in said place in same capacity.

5. The man from Cisco is here as a witness in the S. E. Williams case. No one is present but the notary while my depositions are being taken; have not testified in this case before.

JOHN F. WHITE, for the defendant, testified:

Am 43 years old; reside in Fort Worth; am now master mechanic of the Fort Worth & Denver R. R. My duties are to look after—supervise—the taking care of all the rolling stock of the road.

By rolling stock I mean the locomotives and cars. I have men employed to do the repairs, and have foremen to supervise them, as well as myself. I have been master mechanic for the Fort Worth and Denver road twice inside of the past two years. Prior to
104 that time I was master mechanic of the Chi., St. Louis and N. O. R. R. 12 years; have been working in railroad shops ever since I was a boy; worked my time in them as machinist.

Q. Do you or not use slots and keys in the pins on your engines on the Denver road?

A. Well, as a rule, it ought to be done, but often it is not done. I cannot say that we do it straight through. We do not use slots and keys, because in fact I have never seen a case where it showed that it was actually necessary. It is a custom that has been adopted by some men and not by others. We have some that we use and others we don't. We make the pin long enough so that the weight of them will hold them there. We have Roger Mogul, and Cooke Mogul, and Queen Mogul engines. I cannot say exactly how long the pin is that we use on Roger Mogul engines; about 20 or 24 inches. That will put the end of the pin about five or six inches on the under side. In my whole time working on railroads I don't know of an accident occurring by the front pin on an engine raising up and allowing the engine and tender to come uncoupled.

Cross-examined by pl'ffs:

If the pin is not long enough to go through the lower hole of the casting, it is liable to work up. For a Rogers Mogul engine the — ought to be at least 20 or 24 inches long. Less than that I would not consider dangerous. It is just simply for safety; that is all. If I had a piece of iron 24 inches long to make a pin out of, I would drop that in. If I had a piece only 20 inches long, I would drop that in. If I had a piece 19 inches long, I would not put another inch on it if I was at a place where I had no facilities to do it. If that particular pin was some special pin to be got out, I would order the pin put in 2½ inches in diameter and say 20 inches long.
If I wanted to make a pin reasonably safe, I would have a
105 slot and key put in. There ought to be a slot and key to make it reasonably safe. It is a very essential point to have the stay-chains and the bolts that hold them strong and in good repair. It is a precaution, or, in other words, a guard to safety. With a full load, 16 cars loaded with iron, pulling a slight grade that would be a matter—that would be a matter that would go beyond the average chains. The purpose of safety chains is to help hold the engine and tender together in case the drawbar was to break.

Redirect examination:

The purpose of putting slots and keys in pins is for actual safety. I consider an engine with a pin of proper length without a slot and key reasonably safe. We have them running every day. If you want perfect safety they ought to have a slot and key.

Defendant rests.

J. L. SCOGGINS, called by the plaintiff and sworn, testified:

My name is J. L. Scoggins. I live at Fort Worth. I work for the Texas and Pacific railroad; was working for that road while it was in the hands of the receiver, Brown; was not working for it when it went into the hands of the receiver, I think. I have only been working for the road—it will be two years in July. I remember about the 23rd day of January, 1888, the time of Gay's death. The engine was No. 153. I was in the yard, at least, when it was brought in, and it came in dead, as we call it; the engine did. It had no fire; had to be pulled in like a box car. That was the time they brought in the body of Gay. I looked at the engine to see what was the matter—why it broke apart; did that just for my own satisfaction. My work is on the yard, and I just looked around the engine to see what was the matter. I heard of the death of Gay.
106 After going to the caboose where Gay's remains were—and they told me how it was caused—I went to see the engine; it was sitting right on the track near by; just to see the engine; see what condition it was in; felt an interest in it from the fact Gay was a neighbor; wanted to see what was the matter with it. I went and examined the coupling and found it was coupled all right. The stay-chains were up in good shape. The coupling pin that holds the engine and tender together is a heavy pin. It must be an inch and three-quarters in diameter, I guess. It is some 18 inches long, I suppose. It drops down and couples the engine and tender together. I noticed the coupling pin had no slot nor key in it—in the lower part of the pin. The coupling pin is similar to the coupling pin to couple a wagon together. There should be a slot—usually is—in the coupling pins of engines—any I worked about—some inch and a half or three-quarters long by about a quarter of an inch wide, so as to allow a piece of sheet iron to go in and bend around to keep the pin from working up. There was no slot there, no key, or anything of that kind. That engine is not on the road. They are working it on the yard, not on the road. I didn't notice about the bolts, whether they had been broken off. I just noticed the chains was up to their places. The chains were attached from the engine to the tender.

Cross-examination:

The stay-chains when I got there were all up. Everything seemed to be in order when I got there to look at it. The chains were stuck up the same as any other. I don't know how; I did not notice that. Both sides were up. I am certain that was the engine on which the accident happened. I began railroading some 23 or 24 years ago in North Carolina. In Texas I have not railroaded
107 any, only I broke some on the T. & P. I was only out two or three weeks breaking until I began to work here in the yard. I am night watchman in the yard; don't have anything to do with making up trains, nor coupling them, nor getting out the engines, nor anything of that sort. I don't know as a matter of fact that there is not one-fourth of the engines that pull out of Fort Worth

that have those slots and keys in pins. I never saw many engines when I examined them but what had them; would not have to make right close examination to ascertain; could tell by walking alongside of them. I am speaking of the front pin, the one next to the fire-box. I have noticed many, and never noticed many in my life but what had the slot and key. When I looked at this pin I was just at the side, and looked down under to see what was the matter; didn't go up and pull it out. It was long enough to have a slot and key. It did not run through as far as four or five inches; ran through something like three inches, I suppose; that would give room enough for a slot and key.

Redirect examination:

I have not at any time talked with the attorneys of the railroad in reference to this case or the facts I knew.

Recross-examination:

I have not talked to the plaintiff's attorneys. Well, I believe I was up to see Mr. Wynne on some business here about the time he was connected with these gentlemen (plaintiff's counsel), and I heard something about it.

J. S. WHITLEY, called by the plaintiff, testified:

I am engaged in running a freight engine on the Texas and Pacific railway; have been on that road for four years next August. I know engine No. 153. I remember about the time Gay was
108 killed. To hold an engine and tender together there is a long iron called a drawbar. There is a hole at each end and there is a pin at each end, and this pin goes clear through the deck of the engine, clear through the drawbar and through the casting, and drops clear through. They are all the way from, I guess, 16 inches to 24 inches long—some may be 18 or 20 inches long—and otherwise than that there is what they call a safety chain both sides of this pin, and probably they have got three or four inches play between them so as not to be tight. The purpose of the safety chain is to keep the engine from parting with the tank in case the iron breaks. There are two pins to the drawbar, straight, so they can be taken out and repaired by knocking them up whenever they want to be. If the pin or drawbar should break I think there would be from three to five inches play between the tender and engine on the safety chains; possibly six; somewhere along there. The purpose of the key and slot in a coupling pin is to keep the pin from flying up, coming out, so as to keep the engine and tender from parting.

Cross-examined:

I am now running a yard engine on the Texas and Pacific yard. I know what a hog engine is. If the coupling pin of one of those engines is 19 inches long it will drop four or five inches below the casting. Some of them go considerably farther than that, because the weight and size of the pin is supposed to hold it in. That is the

only pin I ever saw that flew up. I have heard of one, but nobody ever got damaged in the way Gay did; never knew of one in my own personal knowledge. If the pin was 19 inches long and came up so that the drawbar came out, the top of the pin would rise about ten inches above the deck, and on those hog engines it would not be more than three or four inches from the fire-door. The bottom of the fire-door is about six inches from the deck. If the fire-door
109 was open and the pin came up so that the drawbar came out, the light from the fire-door would strike the pin. If the fireman was shoveling coal he would be shoveling right over the pin. He might be going for coal, with his back turned.

Mrs. NANCY J. GAY, plaintiff, recalled:

My husband got $61.00 for three weeks' work, instead of for one month.

Cross-examination:

That was for firing while he was in Big Springs for the T. & P. The time he worked at Big Springs immediately preceded the time he came here and went out on this engine. He had been there firing just preceding the time he came here and went on this engine. He worked at Big Springs just three weeks. Just prior to that time he was working here in the T. & P. shops; in the round-house. He was working on the engines, I don't know exactly what.

Plaintiff rests.

F. W. RACE recalled by the defendant:

The bolts that broke were the bolts that hold the back end of the safety chain, the end that coupled into the tank.

We agree that the above contains a true and correct statement of the facts and evidence in the above-entitled cause.

BALL, WYNNE & McCART,
Plaintiff's Attorneys.
FINCH & THOMPSON,
Att'ys for Defendant T. & P. R'y Co.

Approved.
R. E. BECKHAM, *Judge.*

Filed December 29th, 1890.
L. R. TAYLOR, *Dist. Clerk.*

110 (*Appeal Bond.*)

NANCY J. GAY *et al.*	)	4384. Suit Pending in the
vs.		District Court of Tarrant
JOHN C. BROWN, Rec., and TEXAS & PACIFIC R'Y CO.	)	County, Texas, September Term, 1890.

Whereas in the above numbered and entitled cause pending in the district court of Tarrant county, and at a regular term of said court, to wit, on the 2nd day of December, A. D. 1890, the said Nancy J.

Gay for herself and Bessie Gay recovered judgment against the said Texas and Pacific railway for the sum of seven thousand five hundred dollars, to be equally divided between Nancy J. Gay and Bessie Gay, with interest thereon, from the 2nd day of December, A. D. 1890, at eight per cent. per annum, and all costs of suit, from which judgment the said Texas and Pacific Railway Company has taken an appeal to our supreme court, and desires to suspend the execution of said judgment during the pendency of said appeal:

Now, therefore, we, the Texas and Pacific Railway Company, as principal, and —— —— and —— ——, as sureties, acknowledge ourselves bound to pay to Nancy J. Gay and Bessie the sum of twenty thousand ($20,000.00) dollars, conditioned that the said Texas and Pacific Railway Company shall prosecute its appeal with effect, and in case the judgment of the appellate (supreme) court shall be against it that it shall perform the judgment, sentence, or decree of said court and pay all such damages as said court may award against it,

and further conditioned that the said Texas and Pacific Rail-
111 way Company shall prosecute its appeal with effect and shall pay all costs which have accrued in the court below (the district court) or which may accrue in the appellate (supreme) court in said cause.

Witness our hands this the 27th day of January, 1891.

TEXAS & PACIFIC RAILWAY CO.,
By FINCH & THOMPSON, *Att'ys.*
E. W. TAYLOR.
A. B. SMITH.

Approved this 27th day of January, 1891.
L. R. TAYLOR,
District Clerk.

Filed January 27th, 1891.

L. R. TAYLOR,
District Clerk.

(*Assignment of Errors.*)

In the Tarrant County District Court, Texas.

NANCY J. GAY *et al.*
vs.
JOHN C. BROWN, Receiver, & TEXAS AND PACIFIC R'Y CO. } 4384.

Now comes The Texas and Pacific Railway Company, defendant, by attorney, and makes and files the following assignments of error:

1st assignment of error.

The verdict and judgment are erroneous because the evidence showed without contradiction that neither the defendants nor the servants charged with the duty of repairing and handling the engines and coupling apparatus knew of the alleged danger in the use of the coupling and pin as it existed at time of accident, but

the evidence did establish beyond controversy that this defendant as well as other companies and their servants in charge of engines, round-houses, and machine shops regarded like pins and coupling apparatus reasonably safe and secure.

112 2nd assignment.

The verdict and judgment are erroneous for the reason that if there were any defects in the engine and coupling apparatus plaintiff's husband, knowing or charged with notice thereof, assumed the same as one of the risks incident to his employment.

3rd assignment.

The verdict and judgment are erroneous for the reason that there was nothing in the construction of the pin and coupling apparatus which would put a reasonably prudent man upon notice that there was any danger in using them, and defendants and their servants exercised ordinary care and caution in the selection and use of said pin and coupling, no accident ever having been known to occur as this is alleged and claimed to have occurred.

4th assignment.

The verdict and judgment are erroneous for the reason that plaintiff's husband was guilty of contributory negligence in going upon said engine when he knew or ought to have known of the defect and dangers complained of, if such existed, and, further, in standing astride the opening between the engine and tank when the pin rose into view and in failing to push it into place, if the accident occurred by pin rising from the motion of the cars, while plaintiff's husband was placing coal in the engine, as claimed.

5th assignment.

The verdict and judgment are erroneous because there is no evidence to sustain the conclusions that the pin rose up and came out by the motion of the train and unaided by human hands, as claimed, no witness having testified that such was the fact.

6th assignment.

The verdict and judgment are erroneous because it was
113 established that there was provision made in the order (finally discharging the receiver) for the payment of such claims as plaintiff's, if she is entitled to anything, and by act of Congress, under which this suit was instituted, the court appointing and discharging the receiver still had equity jurisdiction of the claim and this suit and the power and authority to provide for its investigation and order of payment.

7th assignment.

The verdict and judgment are erroneous because there is no allegation or proof to sustain a judgment against this defendant for the tortuous act of said receiver.

8th assignment.

The court erred in overruling defendant's general demurrer for the reason that there was no allegation in said petition which gave a cause of action against this defendant for the acts of John C. Brown, receiver, or his servants and employees.

9th assignment.

The court erred in overruling defendant's special exception to plaintiff's supplemental petition because this defendant was not a party to the original petition filed herein, which was never amended, and because said supplement is filed in reply to the amended answer of John C. Brown, receiver, — has been discharged since filing same and more recently has died and this suit as to him abated.

10th assignment.

The court erred in overruling defendant's plea of the statute of limitation that more than one year and more than two years had elapsed after the cause of action herein declared upon had accrued before this defendant was sued or made a party herein, because such time having elapsed this action was barred.

11th assignment.

114 The court erred in overruling defendant's 4th special exception as to the failure of said petition to allege that there was no provision made for the payment of plaintiff's claim upon the discharge of the receiver, this exception applying specially to the 13th paragraph of plaintiff's 2nd supplemental petition, because if there was such provision plaintiff should appeal to that court.

12th assignment.

The court erred in overruling defendant's 5th special exception because the allegations attempting to fix liability upon this defendant are a departure in pleading from case made by the original petition.

13th assignment.

The court erred in overruling defendant's 6th special exception, which raised the point that there was a variance and contradiction between 1st count in said petition down to and including the 13th with the remainder thereof, constituting the 2nd count.

14th assignment.

The court erred in overruling the 7th special exception of defendant, which pointed out the attempt by plaintiff to contradict the terms of her husband's employment by John C. Brown, and especially does this objection apply to the 24th paragraph of said petition.

15th assignment.

The court erred in overruling the 9th special exception of defendants, which points out the insufficiency of said petition in attempting to hold this defendant liable for the acts of John C. Brown, receiver, because said attempt could only be upheld as an equitable demand based upon a previous judgment against John C. Brown, but there was no allegation that this demand was in judgment against John C. Brown, receiver, or any one else.

16th assignment.

115 The court erred in overruling the 10th special exception of defendant to the sufficiency of said petition because this suit was instituted since the act of Congress allowing receiver to be sued, but said act also provided that such suits should be maintained subject to the equity jurisdiction of the court appointing the receiver, but plaintiff in terms and effect denies the authority and jurisdiction of said United States court in the premises.

17th assignment.

The court erred in allowing plaintiff to prove that all engines on defendant's railway were equipped with slots and keys in the pin on the engine since this accident in question, as shown by bill of exception No. 1, because it is incompetent to show that after an accident there was an improvement in the alleged defective appliance.

18th assignment.

The court erred in refusing defendant's special charge, to the effect that if plaintiff's husband had been employed in the shops at Fort Worth and knew of the alleged defects, then he assumed as a risk, incident to his employment, the fact that the pin had no slot and key, because this would be the law applicable to this state of facts which was established by plaintiff.

FINCH & THOMPSON,
Attorneys for Def't T. & P. R'y Co.

Filed February 25t-, 1891.

L. R. TAYLOR,
District Clerk.

116 (*Statement of Costs.*)

Plaintiffs' clerk's costs	$15 80
Plaintiffs' sheriff's costs	4 40
Defendants' clerk's costs	101 80
Defendants' sheriff's costs	1 60
Miscellaneous	91 20
Total	$214 80

(*Certificate.*)

THE STATE OF TEXAS, }
County of Tarrant. }

I, L. R. Taylor, clerk of the district court of Tarrant county, Texas, do hereby certify that the above and foregoing transcript is a true and correct copy of all the proceedings had in cause No. 4384, wherein Nancy J. Gay *et al.* are plaintiffs and John C. Brown *et al.* are defendants, as the same appear of record and on file in said court.

Given under my hand and seal of said court, at office, in the city of Fort Worth, Tex., this the 1st day of Dec., A. D. 1891.

[L. S.] L. R. TAYLOR,
Clerk District Court, Tarrant County, Tex.,
By —— ——, *Deputy.*

117 *Orders in Supreme Court.*

January 20, 1892.—Submitted on briefs for both parties.

October 3, 1892.—Transferred to court of civil appeals for the second supreme judicial district.

Orders in Court of Civil Appeals.

TEXAS & PACIFIC RAILWAY COMPANY, Appellant, }
vs. } No. 515.
NANCY J. GAY *et al.*, Appellees. }

Conclusions of fact.

Appeal from a verdict and judgment for $7,500 in favor of the widow and minor child of John M. Gay, who was killed on the 22nd day of January, 1888, near Anneta, Parker county, Texas, while in the discharge of his duty as fireman on one of appellant's freight trains.

The engineer thus describes the accident: "We backed out of the side track at Benbrook and went on west until the engine broke loose from the tender and the man fell through and was killed. At the time the engine broke loose he was in the act of putting in fire, shoveling in coal. That was his duty. * * * That was the first time he had ever been on that engine, to my knowledge. The train, at the time of the accident, was going somewhere between 18 and 20 miles an hour, perhaps; about the usual speed of freight trains. * * * I saw the engine was broke loose from the tender and I stopped as soon as I possibly could, and I found the fastenings, the safety chains, were broken and the pins were back
118 to their place; the pin that held the front end of the drawbar into the engine was down in its place and the drawbar was in the tender."

The evidence tended to show that if this coupling pin had had a slot and key in its lower end to hold it to its place (which it did not

have) the accident would not have occurred. It also tended to show, though not without conflict, that the pin was too short, and that the safety chains were insecure.

In submitting the issue of defective machinery or appliances as a ground of recovery the court instructed the jury that negligence was not to be inferred against appellant from the fact that they proved defective, but that the burden was upon appellees to establish negligence in providing them and keeping them in repair by a preponderance of the evidence. The verdict affirming negligence in this respect we cannot say is without support in the testimony.

The court further charged the jury that appellant would not be liable for risks ordinarily incident to railroad service, nor for injuries to which the negligence of the person injured contributes. The verdict, affirming that appellees were not precluded from a recovery on these grounds, also finds support in the evidence.

Conclusions of Law.

1. The foregoing conclusions of fact overrule the first, second, third, and fourth assignments of error.

2. The seventeenth assignment reads: "The court erred in allowing plaintiff to prove that all engines on defendant's railway were equipped with slots and keys in the pin on the engine since the accident in question, as shown by bill of exceptions No. 1, because it is incompetent to show that after an accident there was
119 an improvement in the alleged defective appliance."

The question and answer objected to read: "State whether or not you now use slots and keys on the engines of the Texas & Pacific Railway Company." "We did not have slots and keys in any pins at that date (time of accident); we use slots and keys now on all engines."

The bill of exceptions thus states the objection: "To which question and answer defendant objected, and insisted that evidence called for was not competent."

We are of opinion that this very general statement of the objection did not sufficiently inform the court of the ground relied on to require the exclusion of the evidence. Mr. Greenleaf says: "It is also to be noted, as a rule applicable to all objections to the reception of evidence, that the ground of objection must be distinctly stated at the time or it will be held vague and nugatory." 1 Greenleaf, sec. 421; Ellis *v.* Garvey, 76 Texas, 371.

In Gill *v.* Cambell, 24 Texas, 405, the sufficiency of an objection to a witness, who was defendant in the suit, that "from the state of the pleadings" he was not a competent witness for plaintiff was upheld, but on the ground that it was made definite by a distinct reference to the pleadings. The court there use this language: "We are thus referred to the state of the pleadings for the ground of objection, and they present him in the attitude of an interested party to the suit."

But if we be mistaken in the conclusion that the ground of objection was waived because not stated, we are still of the opinion

that the admission of this evidence would not require a reversal of the judgment, because the same fact had already been proven
120 without objection by other witnesses, and especially Singleton, an employé of appellant, who by deposition testified: "We try to use slots and keys in all our pins now."

The deposition of the engineer, in effect, proved the same fact, and if the court erred in admitting the evidence complained of it was but cumulative upon a matter already established by the proof. Stansell *v.* Cleveland, 64 Texas, 660.

3. In refusing the first special instruction, to which the eighteenth error is assigned, there was no reversible error, because the principle of assumed risks which it embodied was sufficiently covered by the main charge and because it was probably objectionable as being upon the weight of the evidence.

4. The opinion of our supreme court upon the questions certified in this case requires all the other assignments of error to be overruled, unless it be the tenth. That relates to the defense of limitation as raised by appellant's fifth special exception.

In view of the allegations found in appellees' pleadings, we think, upon the authority of the answer of our supreme court to sixth question certified, taken in connection with the rest of that able and learned opinion, if we do not misconstrue its meaning, the action of the court in overruling this exception must be sustained.

One ground upon which appellees sought to maintain this suit, notwithstanding the death of Gay pending his employment under Brown as receiver, was that the Federal court sitting in Louisiana had no power to appoint a receiver to take charge of a railroad in Texas, and that the appointment had been made by the consent, procurement, and collusion of appellant, and therefore that appellant was the undisclosed principal of Brown while acting ostensibly as its receiver, he being in fact its agent merely. We understand this opinion as sustaining this view.

121 Appellees not only alleged the fraudulent concealment, but also that not until ten days before the filing of their last petition against appellant, the suit having been previously prosecuted against Brown as receiver and against appellant on account of the results of the receivership, did they discover that appellant had been falsely holding out Brown to them as its receiver, when in fact he was but its agent. The matters alleged refute the idea of any culpable neglect in not sooner making this discovery. We are not invited by this assignment to determine whether under the proof a sufficient excuse for the delay was shown.

Upon the whole case we conclude that we ought to affirm the judgment.

STEPHENS,
Associate Justice.

Filed in court of civil appeals June 20, 1894.

Motion for Rehearing.

In the Court of Civil Appeals, Second Supreme Judicial District of Texas.

TEXAS & PACIFIC R'Y CO., Appellant,
vs.
NANCY J. GAY *et al.*, Appellees.

Now comes the appellant, The Texas & Pacific Railway Company, and moves the court to set aside its judgment and decision herein and grant appellant a rehearing herein for the following reasons, viz:

1. The court held that appellant's seventeenth assignment of error was not well taken for the reason that the objection made by appellant to the testimony of witness W. G. Dehn, wherein he stated, "We did not have slots and keys at that date (time of accident); we use slots and keys now on all engines;" was too general
125 and not sufficiently distinct to inform the court of the ground relied upon to require the exclusion of evidence, appellant's objection to said testimony having been that the evidence was not competent. In this holding the court erred because the objection was as specific as the nature of the matter would admit of; and, further, because a general objection is sufficient without specification of grounds, where, as in this case, the evidence is not admissible under any circumstances or for any purpose, and the objection to it could not be removed.

2. The court held that if it should be mistaken in deciding that the objection to the said testimony of witness W. G. Dehn was too general and not sufficiently distinct to inform the court of the ground relied upon to require the exclusion of the evidence, still that the admission of the evidence would not require a reversal because the same fact had already been proved without objection by other witnesses, and especially by Singleton, an employee of the defendant, and that the objectionable evidence was merely cumulative upon matter already established by the proof. In this holding the court erred because there is no rule of evidence that will legalize the admission of one piece of illegal testimony on the ground that another piece of illegal testimony had been suffered to be proved, even though one piece should establish the same fact as and be cumulative of the other; and, further, because the fact that the piece of testimony that was admitted without objection comes from a witness of the party who objected to the other, if the testimony unobjected to is elicited upon cross-examination, as was that of the witness Singleton, to which the court refers (and that was the only other evidence upon the point), does not render the illegal testimony admissible.

126 3. The court held that the tenth assignment of error, which complains of the error in ruling of the district court in overruling appellant's special exception setting forth that the plaintiffs'

cause of action was barred by the statute of limitation of one year, was not well taken, upon the ground that the allegations of plaintiffs' pleadings showed fraudulent concealment of the fraud-, conspiracies, and collusions charged against the parties to the suit in which the receivers of the Texas & Pacific Railway Company were appointed and the ignorance of plaintiffs of such frauds, conspiracies, and collusions. In this holding the court erred because the allegations of the pleadings simply stated as a conclusion that the said frauds, conspiracies, and collusions were concealed from plaintiffs, and do not show, either as a conclusion or by a statement of the facts, that the failure of plaintiffs to discover them was not caused by their own neglect or default.

4. The court affirmed the judgment of the district court disregarding the fundamental error of the court in failing to instruct the jury upon the issue of a fraudulent and collusive receivership. In this there was error, 1st, because the question of a fraudulent and collusive receivership not having been submitted to the jury, there was no verdict finding that issue against appellant; 2nd, because there being no evidence of the alleged fraud and collusion other than the record of the proceedings had in the United States circuit court for the eastern district of Louisiana, and the inference of fraud and collusion from said record being wholly unwarranted, the jury could not find against appellant upon that issue, if it had been presented to them; 3rd, because, in view of the deduction of fraud and collusion from said record being unauthorized, there was such fundamental error on the part of the trial court in omitting to submit the issue to the jury as to necessitate a reversal of the
127 judgment of the district court without the requesting of a special charge upon the subject by appellant and without an assignment of errors upon the subject by appellant, the establishment of such alleged fraud and collusion being an essential part of plaintiffs' case.

5. The court affirmed the judgment of the district court disregarding the fundamental error in the proceedings arising out of the holding that the United States circuit court for the eastern district of Louisiana, at New Orleans, had no jurisdiction to appoint a receiver to take charge of and operate that portion of defendants' railway situated in the State and northern district of Texas. In this there was error, 1st, because the court at New Orleans had rightful jurisdiction in the premises; 2nd, because even if the court at New Orleans did not have — jurisdiction as was unassailable upon a direct proceeding, it nevertheless had such jurisdiction as to be unimpeachable collaterally; 3rd, because even if the court at New Orleans had no jurisdiction to appoint a receiver to take charge of and operate the property situated in Texas, still, there being then nothing in the policy of Texas as deducible from its legislation and the decisions of its highest courts interdicting, by virtue of the law of comity, the possession and use of the property by the receiver, deriving his authority from a foreign tribunal, were not unlawful and were entitled to recognition by the courts of Texas.

6. The court erred in affirming the judgment of the district court because the undisputed evidence showed that the deceased Gay contracted with John C. Brown in the capacity of receiver, and therefore he would, had he lived, and his representatives, the plaintiffs, are, he being dead, estopped from attacking or questioning the legality of the appointment of said Brown as said
128 receiver, and on that account there is such fundamental error as to necessitate a reversal of the judgment, especially as the record of the United States court containing the proceedings, by virtue of which it is asserted that the receivership was fraudulent, collusive, and void, were public and open to the whole world, and as it appears from the plaintiff's pleadings that the deceased knew or ought, in the exercise of ordinary diligence, to have known of the fraudulent and collusive design of the parties to the receivership suit as disclosed by said records.

Appellant states that F. W. Ball, R. M. Wynne, and Robert McCart, composing the firm of Ball, Wynne & McCart, are the counsel for the appellees, and that both they and appellees reside in Tarrant Co., Texas.

STEDMAN & THOMPSON,
Attorneys for The Texas & Pacific Railway Company, Appellant.

Endorsed: Let the within motion be filed. June 29, '94. B. D. Tarlton, ch. justice. Filed in court of civil appe-ls June 29th, 1894.

Order Overruling Motion.

TEXAS & PACIFIC R'Y CO. *vs.* NANCY J. GAY *et al.* } 1153 | 515.

SEPTEMBER 19, 1894.

This day came on to be heard the motion of appellant for a rehearing in this cause, which, having been heard and considered by the court, is refused.

129 *Application for Writ of Error to the Court of Civil Appeals, Second District, in a Case on Appeal from Tarrant Co., Texas.*

THE TEXAS & PACIFIC R'Y CO., Appellant, *vs.* NANCY J. GAY *et al.*, Appellees.

To the honorable supreme court of the State of Texas:

Your petitioner, The Texas & Pacific Railway Company, represents—

1st. That this suit was brought in the district court of Tarrant county by appellees, widow and minor child of John M. Gay, on account of injuries sustained by him and resulting in his death

when he was in the service of John C. Brown, receiver of the Texas & Pacific Railway Company, as a fireman, it being alleged that the cause of the death of said John M. Gay was the negligence of said Brown, as receiver, in having an engine and tender in a defective condition and in having the coupling apparatus and machinery defective, and that while working as a fireman on said engine deceased was thrown, by reason of said defects, between the engine and tender, whereby he sustained the injuries that produced his death.

The issue in the case, as developed by the evidence, was the negligence *vel non* of the defendant in not having a slot and key in the lower end of the coupling pin used in holding the engine and tender together and in the pin's being too short and in the insecurity of the pin and the safety chains on the sides of the pin. The evidence established that there was no slot and key, but there was a conflict of evidence as to the necessity for them, and upon the issues as to the pins being too short and the pin and safety chains being insecure there was conflict of evidence.

The suit was filed against Brown as receiver, but upon his discharge it was prosecuted against the Texas & Pacific Railway
130 Company, and it was sought to hold that company liable upon three grounds, namely: 1st, the making of betterments by the receiver upon the property and its return in the improved condition to the company without sale; 2nd, the appointment of the receiver by collusive agreement between the parties to the proceeding in which the appointment was made; 3rd, a contract by virtue of which the company, before the return to it without sale of the property, assumed all liabilities incurred by the receiver.

Plaintiffs' damages were laid in the sum of twenty-five thousand dollars, and the court rendered judgment for plaintiffs against appellant for ten thousand dollars, and appellant prosecuted an appeal, upon hearing which the court of civil appeals affirmed the judgment of the district court.

2. That the court of civil appeals erred in not sustaining appellant's seventeenth assignment of error, which is as follows: "The court erred in allowing plaintiff to prove that all engines on defendant's railway were equipped with slots and keys in the pin on the engine since the accident in question, as shown by bill of exception No. 1, because it is incompetent to show that after an accident there was an improvement in the alleged defective appliance."

Defendant's bill of exception No. 1, a certified copy of which is hereto attached, shows that the question and answer objected to are: "Q. State whether or not you now use slots and keys on the engines of the Texas & Pacific Railway Company." "A. We did not have slots and keys in any pins at that date (time of accident); we use slots and keys now on all engines." The bill of exceptions thus states the objection: "To which question and answer defendant objected and insisted that the evidence called for was not competent."

131 The court of civil appeals held that "this very general statement of the objection did not sufficiently inform the

court of the ground relied on to require the exclusion of the evidence," and overruled the seventeenth assignment, which presents the error. In this the court of civil appeals erred, because the objection was as the nature of the matter would admit of, and, further, because a general objection is sufficient, without specification of grounds, where, as in this case, the evidence is not admissible under any circumstances or for any purpose and the objection to it could not be removed.

The ruling of the court of appeals is complained of in the first ground of appellant's motion for rehearing. In support of our position we refer the court to the following authorities:

Cheatham *vs.* Riddle, 8 Tex., 162; Stiles *vs.* Giddens, 21 Tex., 785; Rice on Evidence, p. 925, *see.* 364.

3. That the court of civil appeals erred in not sustaining the appellant's seventeenth assignment of error, which has been reproduced in the last preceding paragraph of this petition, upon the ground stated in the opinion in the following language: "But if we be mistaken in the conclusion that the ground of objection was waived because not stated, we are still of the opinion that the admission of the evidence would not require a reversal of the judgment, because the same fact had already been proven by other witnesses, and especially Singleton, an employee of appellant, who testified by deposition: "We try to use slots and keys in all our pins now." The deposition of the engineer, in effect, proved the same fact; and if the court erred in admitting the evidence complained of it was but cumulated upon a matter already established by the proof. Stansell *vs.* Cleveland, 64 Texas, p. 660.

132 This holding was erroneous, because there is no rule of evidence that will legalize the admission of one piece of illegal testimony on the ground that another piece of illegal testimony has been admitted without objection, even though one should establish the fact as and be cumulative of the other, and, further, because the fact that the testimony admitted without objection comes from a witness of the party who objected to the other testimony, if that not objected to is elicited upon cross-examination, as was that of the witness Singleton (and there was none from any other witness), does not render the illegal testimony objected to admissible. The ruling of the court of civil appeals is complained of in the second ground of appellant's motion for rehearing. In support of our position we refer the court to the following authorities: Shiver *vs.* Abbey, 77 Texas.

4. That the court of civil appeals erred in not sustaining the appellant's tenth assignment of error, which is as follows: "The court erred in overruling defendant's plea of the statute of limitations that more than one year and more than two years had elapsed after the cause of action herein declared upon had accrued before this defendant was made a party herein, because such time having elapsed this cause of action was released." In overruling this assignment of error the court of civil appeals said: "The opinion of our supreme court upon the questions certified in this case requires all the other assignments of error to be overruled, unless it be

the tenth. That relates to the defense of limitation as raised by appellant's fifth special exception. In view of the allegations found in appellees' pleadings, we think, upon the authority of the answer of the supreme court to the sixth question certified, taken in connection with the rest of that able and learned opinion, if we do not misconstrue its meaning, the action of the court in
133 overruling this exception must be sustained. One ground upon which appellees sought to maintain this suit, notwithstanding the death of Gay pending his employment under Brown as receiver, was that the Federal court sitting in Louisiana had no power to appoint a receiver of a railroad in Texas, and that the appointment had been by the consent, procurement, and collusion of appellant, and therefore that appellant was the undisclosed principal of Brown while acting ostensibly as its receiver, he being, in fact, its agent merely. We understand this opinion as sustaining this view. Appellees not only alleged the fraudulent concealment, but also that not until ten days before the filing of their last petition against appellant—the suit having been previously prosecuted against Brown as receiver and against appellant on account of the results of the receivership—did they discover that appellant had been falsely holding out Brown to them as its receiver, when in fact he was but its agent. The matters alleged refute the idea of any culpable neglect in not sooner making this discovery. We are not invited by this assignment to determine whether, under the proof, a sufficient excuse for the delay was shown." This holding was erroneous, because the allegations of the pleadings simply stated as a conclusion that the frauds, collusions, and conspiracies charged against the parties to the proceeding in which the receiver was appointed were concealed from plaintiffs, and do not show either as a conclusion or by a statement of the facts that the failure of plaintiffs to discover wrongs was not caused by their own neglect or default. Though defendant's exception upon the ground of limitation was special, every special exception embraces a general demurrer, and the allegations of plaintiffs excusing their delay in suing the appellant were bad on general demurrer. The error here complained of is presented in the third ground of ap-
134 pellant's motion for a rehearing. In support of our position we refer the court to the following authorities: Pryor *vs.* Moore, 8 Texas, 250; Dumas *vs.* Hardwick, 19 Texas, 238; Chitty on Pleadings (9 Am. ed.), 664; Bremond *vs.* McLean, 45 Texas, —; Calhoun *vs.* Burton, 64 Texas, 510.

5. That the court of civil appeals erred in affirming the judgment of the district court, thereby disregarding the fundamental error of the district court in predicating its judgment upon the issue of a fraudulent and collusive receivership, if it is to be considered that the judgment is based upon that issue. In this there was error: 1st, because, the question of a fraudulent and collusive receivership not having been submitted to the jury, there was no verdict finding that issue against the appellant; 2nd, because, there being no evidence of the alleged fraud and collusion other than the record of the proceedings had in the United States circuit court for the east-

ern district of Louisiana, and the inference of fraud and collusion from said record being wholly unwarranted, the jury could not have found against appellant if that issue had been submitted to them; 3rd, because, inasmuch as the deduction of fraud and collusion from said record is unauthorized, there was such fundamental error on the part of the trial court in founding its judgment upon the assumption of the undisputed establishment of said fraud and collusion as to necessitate a reversal of the judgment against appellant, notwithstanding appellant did not request a special charge and did not assign error upon the subject. We invite the court's attention to the fact that though we by motion asked the court of civil appeals to make a finding of fact stating whether it is shown by the record that John C. Brown was appointed and discharged as receiver, and that the property committed to his charge and
135 control as receiver was restored to appellant by collusion, the most the court could state upon the subject was that the property was placed and continued in the hands of Brown for two or three years by the mutual consent and for the mutual benefit of the two companies, plaintiff and defendant in the suit in which the receivership proceedings were had. The error of the court of civil appeals in the respect complained of constitutes the fourth ground of appellant's motion for rehearing. In support of our contention we refer the court to Claiborne *vs.* Tanner, 18 Texas, 78; Preston *vs.* Breedlove, 45 Texas, 48; Hollinsworth *vs.* Halhausen, 17 Texas, 47; Lumpkin *vs.* Murrill, 46 Texas, 51; Railway Co. *vs.* Kirk, 62 Texas, 233.

6. That the court of civil appeals erred in affirming the judgment of the district court, thereby disregarding the fundamental error in the proceedings arising out of the holding that the United States circuit court for the eastern district of Louisiana at New Orleans had no jurisdiction to appoint a receiver to take charge of and operate that portion of defendant's railway situated in the State and northern district of Texas, 1st, because the court at New Orleans had rightful jurisdiction in the premises; 2nd, because, even if the court at New Orleans did not have such jurisdiction as was unassailable upon a direct proceeding, it nevertheless had such jurisdiction as to be unimpeachable collaterally; 3rd, because, even if the court at New Orleans had no jurisdiction to appoint a receiver to take charge of and operate the property situated in Texas, still, there being then nothing in the policy of Texas as deducible from its legislation and the decisions of its highest courts interdicting, the possession and use of the property by the receiver, deriving his authority from a foreign tribunal, were, by virtue of comity, not unlawful and were entitled to recognition by the courts of
136 Texas.

In the fifth ground of appellant's motion for rehearing the error now being considered is presented. In support of our position we refer the court to Muller *vs.* Dow, 94 U. S., 277; Trust Co. *vs.* Railway, 29 Fed. Rep., 620; The State *vs.* Railway, 18 Md., 193; Railway *vs.* McAllister, 115 U. S., 1; Osborn *vs.* Bank, 9 Wheat., 817; Catlin *vs.* Silver Plate Co., 123 Ind., 477; Seremp *vs.* Gatlin,

128 Ill., 566; Note to Humphreys *vs.* Hopkins, 15 Am. St. Rep., 79; Comstock *vs.* Frederickson, 53 N. W. Rep., 713; Falk *vs.* James, 23 N't'l Rep., 813; 20 Am. and Eng. Encyl. of Law, 66.

7. The court of civil appeals erred in affirming the judgment of the district court because the undisputed evidence showed that the deceased, John M. Gay, contracted with John C. Brown, as receiver, and therefore he would, had he lived, and his representatives, the plaintiffs, are, he being dead, estopped from questioning the legality of said Brown as receiver, and for that reason there is such fundamental error as to necessitate a reversal of the judgment, especially as the records of the United States court containing the proceedings by virtue of which it is asserted that the receivership was fraudulent and collusive and void were public and open to the whole world, and as it appears upon the plaintiffs' pleadings that the deceased knew or ought in the exercise of ordinary diligence to have known of the fraudulent and collusive design of the parties to the receivership suit as disclosed by the record thereof. Of this error of the court of civil appeals we have complained in the sixth ground of our motion for rehearing. In support of our position we refer the court to Railway *vs.* Culberson, 72 Texas, 375.

8. That the appellees, Nancy J. Gay and Bessie Gay, who are the parties adversely interested to appellant, reside in Tarrant county, Texas, and that F. W. Ball, R. M. Wynne, and Robert McCart, composing the firm of Ball, Wynne & McCart, who reside in Tarrant county, Texas, are the attorneys for the appellees in this suit.

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9. That appellant filed a motion for rehearing in the court of civil appeals, presenting distinctly all the points upon which the writ of error is asked, and *and* reference- to the various grounds of which have been made in the foregoing part of this petition, and that said motion has been overruled by said court of civil appeals.

10. That appellant has obtained from the clerk of said court of civil appeals a duly certified transcript, embracing copies of the conclusions of law and fact filed in the cause by the court of civil appeals, there being no opinion other than the conclusion of law; of the judgment in the trial courts; of the bond given in the court below; of the judgment of the court of civil appeals; of the motion for rehearing; of the order overruling the motion for rehearing; of motion for additional conclusions of fact; of additional conclusions of fact; of plaintiff's original petition; of plaintiff's amended supplemental petition; of plaintiff's second amended supplemental petition; of second amended answer of the Texas & Pacific Railway Company; of order discussing as to John C. Brown, receiver; of order on demurrers; of defendant's bill of exception No. 1, and of the statement of facts, all of which appellant makes a part of this petition, and asks that the same be considered in connection hereunto.

Wherefore appellant prays that its petition and accompanying transcript be filed by the clerk of the supreme court and docketed, and that notice of said filing be given by him to the clerk of said court of civil appeals; that this petition be granted; that writ of

error and citation in error issue herein as the law provides, and that upon hearing the judgment of the court of civil appeals
138 and of the district court be reversed, and this cause be remanded for a new trial, and that appellant recover from appellee all costs of the civil court of appeals and of the supreme court; and appellant will ever pray, etc.

STEDMAN & THOMPSON,
Attorneys for the Texas & Pacific Railway Company, Petitioner.

I accept service of citation in this case and waive the issuance of a certified copy of said citation this the 3rd day of December, A. D. 1894.

BALL, WYNNE & McCART,
Attorneys for Defendant in Error.

In Supreme Court of Texas.

TEXAS AND PACIFIC RAILWAY CO. *vs.* NANCY J. GAY. } From Tarrant Co., Second District.

DECEMBER 3, 1894.

This day came on hand to be heard the application of the Texas & Pacific Railway Company for a writ of error to the court of civil appeals for the second supreme judicial district, and, the same having been duly considered, it is ordered that said application be granted and the writ of error issued as prayed for.

TEXAS & PACIFIC RAILWAY COMPANY *vs.* NANCY J. GAY. }

JANUARY 10TH, 1895.

Submitted on briefs for both parties.

139 TEXAS & PACIFIC RAILWAY CO. *vs.* NANCY J. GAY *et al.* } No. 250. From Tarrant County, 2nd District.

Nancy J. Gay, for herself and minor child, Bessie Gay, on the 6th day of February, 1888, sued John C. Brown, as receiver of the Texas & Pacific Railway Co., in the district court of Tarrant county, Texas, for damages resulting to them from the death of John M. Gay, the husband and father of plaintiffs, alleging that Brown was appointed such receiver by the United States circuit court at Dallas, and that while said receiver was operating said road John M. Gay, being in the employ of said receiver as fireman on a train of said road in Parker county, Texas, was killed by reason of the defective coupling apparatus allowing the engine and tender to separate, whereby he was thrown down onto the track between them.

This petition stated no cause of action for the reason that the statute allowing damages for injuries resulting in death did not at

that time include a receiver. Turner *vs.* Cross & Eddy, receivers, 83 T., 218.

Plaintiffs on May 17, 1890, filed a supplemental petition in answer to same pleading of said receiver and by way of "supplementary amendment" to said original petition, making the railroad company a party defendant, and alleging, in addition to the facts set up in the original petition, in great detail, facts sufficient, if true, to show that the Missouri Pacific Railway Co. and The Texas & Pacific Railway Co., defendant herein, on the 15th day of December, 1885, through fraud and collusion, procured the appointment of said Brown as receiver of the Texas & Pacific Railway Co. ostensibly upon the ground that it was largely indebted to the Missouri Pacific Railway Co. which it was unable to pay, and that its road-bed was in bad condition and needed large sums to place it in repair, and that unless prevented by appointment of a receiver its officers would divert all its resources and revenues to payment of interest
140 on its bonded debt, leaving the road-bed unrepaired, when in truth and in fact no such real indebtedness existed, and, if any apparent indebtedness existed between said companies, it, as well as the condition of the road-bed, was brought about by the promoters and managers of the Missouri Pacific system, of which the Texas and Pacific Railway Co. was a member, in anticipation of and for the fraudulent purpose of procuring the appointment of said receiver, so that said road should continue to be operated under the direction and in the interest of said system free from the annoyance of its local creditors; all of which was concealed from and was unknown to the hon. judge of the circuit court of the United States in and for the eastern district of Louisiana who made said appointment.

Said supplemental petition further alleged that while said Brown was ostensibly the receiver and officer of said court he was during the whole of said time and at the time of the death of said Gay, in truth and in fact, but the agent of the Texas & Pacific Railway Co. and the Missouri Pacific Railway Co., and was managing, controlling, and operating said road, and employing servants therefor on their behalf and for their use and benefit, and that while so acting he employed deceased, Gay, on Jan. 23, 1888, the day he was killed, said Gay being then ignorant of and having no notice of said collusive suit, and that plaintiffs were wholly ignorant of said collusive agreements at the date of filing said original petition, on Feb. 6, 1888, and, same having been concealed from them by defendants Brown and The Texas & Pacific Railway Co., they were not aware of them until ten days before the filing of said supplemental petition, on May 17, 1890.

Said supplemental petition is very lengthy, and it would serve no useful purpose to set it out in full.

We are of the opinion that the facts alleged were, if true, sufficient to have authorized the jury to find that "the appointment of the receiver was obtained through collusion of the parties
141 to the suit in which the appointment was made," and that "in such case the company would be as fully responsible for

negligence in the operation of its road through injury resulted to a third person as would it be if its road had been operated under the management of a superintendent appointed by its directory," and that "the facts which show such liability may be found in this cause," or, in other words, while the collusive decree might be binding on the parties thereto, who participated in imposing upon the jurisdiction of the court, it would not be binding upon a third person, even an employee, who could show the collusion, and thereby have the receiver treated as the agent of the railroad for whose negligence resulting in death it would be responsible. Texas & Pacific R'y Co. *vs.* Gay, 86 Tex., 604.

No question is raised here as to the sufficiency of the petition.

Defendant Brown having died and the cause *ah*ving been discontinued as to him before trial, the remaining defendant, The Texas & Pacific Railway Company, in the trial court excepted to the petition on the ground that it appeared therefrom that the cause of action accrued more than one and more than two years before the said railroad was made party defendant, and therefore plaintiffs' demand against it was barred by limitation. The overruling of this exception by the trial court and the court of civil appeals is here assigned as error.

The cause of action accrued January 23rd, 1888, the date of Gay's death, and the suit was not instituted against the railroad defendant until April 24th, 1890, the date of filing the first supplemental petition aforesaid, and the period of limitation is one year as to the surviving wife, who is not claimed to have been laboring under any disability.

If for any cause the wife's claim was not barred, of course the child's would not be, and therefore it will not be necessary
142 for us to notice the sufficiency of the facts stated to constitute a plea of minority.

According to the case made by the petition, plaintiffs' cause of action depended upon the collusion and fraud in securing the appointment of the receiver, whereby and only by reason thereof such receiver became as to plaintiffs the mere agent of The Texas & Pacific Railway Company, defendant.

The petition further charges that defendant railroad concealed said fraud and collusion from plaintiffs, and they did not discover same until within ten days of the filing of said supplemental petition against said railroad, and that during all of said time said railroad was holding out said receiver as its lawful receiver, and denying that he was its agent for whose negligence it was liable to plaintiffs.

Thus, we have the defendant charged with (1) having collusively and fraudulently imposed upon the court, whereby it secured the appointment of a receiver whose agency the law estopped it from denying by reason of the secret fraud in the means used and purpose actuating it in securing the appointment; (2) having concealed such secret fraud from plaintiffs, and (3) with having denied such agency and affirmed the validity of said receivership, notwithstanding its knowledge of the real facts, when it was aware of the fact

that plaintiffs were being misled, by reason of the apparent validity of the receiver's appointment and defendant's acquiescence therein, into prosecuting their claim against the ostensible receiver instead of the defendant railroad company.

If the facts alleged be true, the appointment was a fraudulent imposition upon the court, and the subsequent holding out to the plaintiffs of its real agent, Brown, as its receiver was a continuing fraudulent concealment of the true facts constituting plaintiffs' cause of action against the Texas & Pacific Railway Company, and excepted the plaintiffs' claim from the operation of the stat-
143 ute, there being nothing in the case charging plaintiffs with negligence in failing to discover the concealed fraud, and therefore the exception was properly overruled. Texas & Pacific Railway Co. *vs.* Gay, 86 Tex., 608.

Defendant also pleaded limitation, but there is nothing in the record to show that such defense was urged or called to the attention of the court or jury on the trial. It is not mentioned in the charge of the court. No charge was asked by defendant on such issue, nor was the fact that the charge of the court authorized a recovery upon a state of facts in which the issue of limitation was not included assigned as error in the court of civil appeals. Therefore the court of civil appeals properly declined to consider the question as to whether the evidence showed the claim to have been barred, and it will not be considered here.

The accident appears to have happened by reason of the fact that the coupling pin worked up so as to let the bar connecting the engine and tender slip out, thereby allowing them to separate so that deceased fell between. The negligence was claimed by plaintiffs to consist of the fact that said pin did not have a slot and key in the lower end of it to prevent its working up. It appears to have been concluded that there was no slot and key in the pin, but whether it was negligence to use it without them was a disputed question of fact. Under this state of the evidence defendant read the deposition of Singleton, one of its witnesses, who, in answer to a cross-interrogatory, said, "We try to use slots and keys in all our pins now." Defendant having read this answer to the jury, we think it should be considered as if given in answer to a direct interrogatory, for defendant was not bound to read the answers to cross-interrogatories.

Defendant next read in evidence the deposition of Dehn, one of its witnesses, with the exception of the following answer to one of the cross-interrogatories which plaintiffs then offered to read, to wit, "We use slots and keys now on all engines;" to which
144 evidence defendant objected on the ground that the same "was not competent;" which objection the court overruled and allowed the answer to be read by plaintiffs; to which defendant duly excepted. We are of the opinion that the objection was sufficiently specific to require the exclusion of the testimony if the fact that after the accident the company began to use slots and keys in the pins was not admissible upon the issue of negligence, but we are also of the opinion that since defendant had already shown the same fact by its own witness, Singleton, and there was no attempt

made to withdraw or dispute Singleton's statement, no injury could have resulted to defendant from the admission of Dehn's statement, for its exclusion would have left Singleton's statement undisputed, and since introduced by defendant conceded to be true.

We do not wish to be understood as holding that such evidence was not admissible, as each member of this court is strongly inclined to the opinion that the cases excluding such testimony are not founded upon sound reasoning.

The other questions raised by the application are disposed of adversely to plaintiff in error in the former opinion in this case on certified questions. Texas & Pacific Railway Company *vs.* Gay, 86 Tex., 571.

The judgment is affirmed.

DENMAN,
Associate Justice.

Opinion delivered March 18, 1895.

145 *Judgment of the Supreme Court.*

Rendered March 18, 1895.

TEXAS & PACIFIC RAILWAY CO. *vs.* NANCY J. GAY *et al.* } No. 250. From Tarrant County, 2nd District.

Opinion delivered by Associate Justice Denman.

This cause came on to be heard on writ of error to the court of civil appeals of the second supreme judicial district, and the original transcript in said cause being before the court, as well as the transcript showing the proceedings had in said court of civil appeals, and these having been duly considered, because it is the opinion of this court that there was no error in the judgment of said court of civil appeals nor of the district court, it is therefor considered, adjudged, and ordered that said judgment be affirmed; that the defendants in error, Nancy J. Gay, for herself and for her minor child, Bessie Gay, do have and recover of and from the plaintiff in error, The Texas & Pacific Railway Company, and its sureties, E. W. Taylor and A. B. Smith, the amount adjudged in the district court, together with all costs in this behalf expended in this court and the court of civil appeals, and this decision be certified to the district court for observance.

Motion for Rehearing.

Filed April 2, 1895.

In the Supreme Court of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY *vs.* NANCY GAY *et al.* } No. 250. From Tarrant County, Second District.

To the honorable supreme court of the State of Texas:

146 Now comes your petitioner, The Texas & Pacific Railway Company, and prays the court that the judgment herein rendered on the 18th day of March, 1895, by this honorable court, directing the affirmance of the judgment of the district court in this case, be set aside, and that a rehearing be granted this appellant, for the reason that this court erred in rendering said judgment as follows:

1.

It appears from the record that at the time the deceased, John M. Gay, received his injuries he was in the employ of John C. Brown, receiver of the Texas & Pacific Railway Company, and that said John C. Brown was acting as such receiver and had charge of all the property of the said Texas & Pacific Railway Company by virtue of certain orders and decrees made in the circuit court of the United States for the fifth circuit, at New Orleans, La., and that said court had proper jurisdiction to make such appointment, and that at said time the said Brown was a valid receiver.

Wherefore it says that under and by virtue of the laws of the State of Texas no suit arose against said Brown by reason of the death of said Gay.

2.

It says that the ruling made by this court in this case that the circuit court of the United States at New Orleans had no power to appoint John C. Brown receiver was erroneous and contrary to the law and not supported by the evidence, as appellees offered no testimony to sustain the allegations made in the petition with reference to fraud or collusion. It says that in par. 8 of the petition filed in the circuit court of the United States at New Orleans, La., under which petition said John C. Brown was appointed receiver, the following allegation was made: "That by deed dated the 20th of June, 1881, by and between the New Orleans Pac. R'y Co., party of the first part, and the Texas & Pacific R'y Co., party of the second part, which deed is hereby referred to as a part hereof of this bill, the Texas & Pacific R'y Co., by virtue of the franchises obtained by its various charters from the Government of the U. S. and acquired from the legislature of the State of Texas and by virtue of the authority conferred by the laws of the State of Louisiana, acquired by and under the same name the railway

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and all of the franchises, rights, and appurtenances thereto of the New Orleans Pacific R'y Co., a line constructed and being operated between the city of Shreveport, in Caddo parish, La., and the city of New Orleans." * * * In par. 13 of the same petition it was alleged that "the said Texas & Pacific R'y Co. executed a general terminal mortgage upon its terminal and other properties at New Orleans." In par. 15 it was alleged that the Texas & Pacific R'y Co. was the owner, among other things, of 336 miles of railway between Shreveport, Gouldsboro, and New Orleans, and that bonds had been issued under a mortgage of July 31, 1880, upon the New Orleans division of its line of railway. Said petition was sworn to, was put in evidence by appellees, and no testimony was offered to contradict the said allegations. It also appears in the deposition of John C. Brown, of record in this case, which was offered by plaintiffs, that while he was receiver he had expended moneys and performed work on the New Orleans division. It was also alleged in the second amended supplemental petition of appellees, filed in this case, that at the time of the appointment of the receiver the Texas & Pacific Railway Company was and had been for a long time the owner of certain lines of railroad extending through Texas to certain counties in the State of Texas and Louisiana; from all of which it appears without contradiction that the Texas & Pacific Railway Company at the time of the appointment of such receiver
148 did actually have a line of railway in the State of Louisiana and extending to the city of New Orleans, and that it owned certain properties in and near said city, and that it had issued certain bonds covering said property, and from which it also appeared that the appointment of said receiver by the said circuit court was regular and valid, and that the holding of this court to the contrary was erroneous.

3.

It says that the court erred in holding, in effect, that if the Texas & Pacific Railway Company permitted Brown to take possession of its property in Texas, that said Brown would be simply its agent, as said holding is based upon the assumption that the circuit court of the United States had no jurisdiction, and that the Texas & Pacific Railway Company permitted said Brown to take charge of its property, when in fact, as it appears from the record, the said court did have jurisdiction; and, further, that the said Brown took charge by virtue of a decree, and that the said company, being in court, had no power or authority to prevent same.

4.

It says that this court also erred in holding that, although the deceased, Gay, contracted with the said Brown as receiver and recognized him as such, it did not preclude his representatives from disputing the validity of the appointment of said Brown as receiver.

5.

It says, also, that this court erred in affirming the judgment herein, for the reason that the record shows that no issue with reference to fraud and collusion of the parties in procuring the appointment of John C. Brown as receiver was ever submitted to the jury or passed upon by the court. In fact, the only inference to be gathered from the record in this case is that said issue was
149 abandoned by the plaintiff in the court below.

6.

The court erred in holding that defendant's exception raising the question of limitations was not properly taken.

7.

The court erred in holding that the admission of the evidence complained of by appellant with reference to the use of slots and keys after the accident was not erroneous.

8.

It says the court was in error in holding that the appointment of Brown as receiver was void for the reason that this court had no power to reverse or disturb the orders and decrees of the circuit court of the U. S. sitting at New Orleans in making the appointment and in directing him to take charge of the lines and property of this appellant.

9.

It says that the judgment of this court in that respect was also erroneous for the reason that it appeared from the record that the said Brown was also acting as receiver by virtue of an appointment made by the circuit court sitting at Dallas, Texas.

The court erred in its judgment affirming the judgment of the court below and in holding that plaintiffs' cause of action was not barred by the statute of limitation of twelve months for the following reasons:

1. If the court holds that John C. Brown was not a duly and regularly appointed receiver of the Texas & Pacific railway for the reason that the circuit court of the United States for the fifth circuit, sitting at New Orleans, had no jurisdiction to appoint him such receiver over the property in Texas, this would be a question of law and not a question of fact, and ignorance of the law
150 would not excuse a party from instituting his suit within the time required by law, nor would it suspend the operation of the statute of limitation.

2. If the court intends to decide by its opinion that as a matter of fact said John C. Brown was not the duly appointed and authorized receiver of the Texas and Pacific railway from the fact that his appointment was collusively made, then it errs in affirming the judgment of the court below, for the reason that under the law as it existed at the time plaintiff's cause of action accrued no action

could be maintained against a receiver for injuries resulting in death, and the burden of proof was upon plaintiff to establish the fact that the said John C. Brown was not a duly appointed receiver of the Texas and Pacific railway before any recovery could be had, and the record in this case discloses the fact that no proof was made nor any evidence introduced showing that the said John C. Brown was not a duly authorized and appointed receiver of the Texas and Pacific railway, and this is a fundamental error which could be taken advantage of in this court without a specific assignment of error having theretofore been filed.

Petitioner states that Nancy J. Gay and Bessie M. Gay, appellees, are residents of Tarrant county, Texas, and that their attorneys are F. M. Ball, Robert McCart, and R. M. Wynne, all of whom reside in Tarrant county, Texas.

Wherefore it prays that this court grant appellant a rehearing in this cause, and that for the errors complained of it be directed that the judgment of the district court be reversed and this cause remanded.

T. J. FREEMAN,
GEORGE THOMPSON,
Attorneys for Appellant The Texas & Pacific Railway Co.

Filed April 2, 1895.
Submitted April 15, 1895.

151 In the Supreme Court of the State of Texas.

APRIL 18, 1895.

TEXAS & PACIFIC RAILWAY COMPANY *vs.* NANCY J. GAY *et al.* — No. 182 | 250. From Tarrant County, 2nd Dist.

This day came on to be heard the motion of plaintiff in error for a rehearing, and, the same having been duly considered, it is ordered that said motion be overruled; that the plaintiff in error, The Texas & Pacific Railway Company, and its sureties, E. W. Taylor and A. B. Smith, pay all costs of this motion.

152 *Certified Questions from Court of Civil Appeals.*

In Court of Civil Appeals, 2nd Supreme Judicial District.

TEXAS & PACIFIC RAILWAY COMPANY *vs.* NANCY J. GAY *et al.* — Appeal from Tarrant County.

To honorable supreme court of Texas:

In above cause we deem it proper to certify for decision the questions following this statement of the nature of the suit:

Nancy J. Gay, for herself and as next friend for Bessie Gay, her infant daughter, brought this suit on the 6th day of February, 1888, against John C. Brown, as receiver of the Texas & Pacific Railway

Company. Plaintiff alleged, in substance, that John M. Gay, her husband and father of Bessie, had been killed while in defendant's receiver's employ as fireman on a locomotive engine, and that his death was caused by said receiver's negligence in failing to properly operate the road and furnish him safe appliances, etc.

On February 25th, 1889, Brown, as receiver, filed his first amended original answer, setting up the following defences, viz:

1. That defendant could not be sued without permission of the United States circuit court from which he derived his authority.

2. That defendant was a resident of Dallas county and was improperly sued out of the county of his residence.

3. General demurrer and general denial.

4. Special answer, setting up the final discharge of defendant as receiver on the 31st day of October, 1888.

5. Further special answer, setting up the conditions of his order of discharge, whereby plaintiff's claim was barred, because not presented before February 1, 1889, to the United States circuit court.

153 6. Plea of contributory negligence.

On February 26th, 1889, plaintiffs filed a supplemental petition, excepting to the sufficiency of the special answer setting up the discharge of the receiver.

These exceptions were sustained by the court, and, on hearing, a verdict and judgment against the receiver was rendered for $10,000. From this judgment the receiver appealed, and said judgment was reversed and remanded in order that the Texas & Pacific Railway Company might be substituted as party defendant in the place of the receiver. Opinion by Stayton, C. J., delivered March 11th, 1890, reported in 76 Texas, 444 (Brown, receiver, *vs.* Gay).

On the 24th day of April, 1890, plaintiffs filed a first amended supplemental petition, substituting Texas & Pacific Railway Company for said receiver as party defendant to their action, and alleging therein in substance:

1. That the suit in the United States circuit court entitled Missouri Pacific Railway Company *vs.* Texas & Pacific Railway Company was collusively brought and the receiver was appointed by consent of both parties to the action, and that Brown, while ostensibly receiver, was in reality but the agent of said Texas & Pacific Railway Company, and was acting on its behalf throughout the whole of said receivership, and that said Texas & Pacific Railway Company was his undisclosed principal.

2. That at and before the discharge of said Brown as receiver the said Texas & Pacific Railway Company bound itself, in writing, to assume and pay off all liabilities of said Brown incurred by him during the operation of said railroad, as receiver, and that said obligation inured to the benefit of plaintiffs.

3. That during the operation of said railroad by Brown,
154 as receiver, he had, out of the current receipts of said road, made permanent improvements and betterments thereon to the amount and value of two million dollars, and that the value of

said property, when restored to said railroad company, was enchanced to that extent.

4. That by reason of the foregoing facts said Texas & Pacific Railway Company had *became* liable to plaintiffs for the damages claimed in their original petition.

Afterward, on the 17th day of May, 1890, plaintiffs filed their second supplemental petition, in which the allegations in the above first-named amended supplemental petition were amplified and made more elaborate (Tr., p. 3). To this pleading was attached, as an exhibit, a transcript from the United States circuit court for the district of Louisiana containing the record and proceedings in the case of Missouri Pacific Railway Company *vs.* Texas & Pacific Railway Company, above referred to, in which Brown was appointed receiver (Tr., p. 38 *et seq.*). To this supplemental petition defendant railway company replied on December 1st, 1890, by second amended original answer, upon which it went to trial, which contained, in substance:

1. A general demurrer.

2. Special exception to failure of said petition to charge either that said Brown knew or ought to have known of the defects complained of.

3. Special exception to claim of punitory damages.

4. Special exception to whole supplemental petition because not in reply to answer of the Texas & Pacific Railway Company.

5. Exception setting up the statute of limitation.

10. Exception to prayer of lien.

11. Exception to whole of supplement which attempts to plead as an equitable demand against the Texas & Pacific Rail-
155 way Company an unliquidated demand against John C. Brown, receiver, etc.

12. Exception to allegations which attempt to nullify the act of Congress under which the suit was originally instituted.

13. General denial.

14. Plea of statute of limitations.

15th. Plea of contributory negligence.

16th. Plea that there was no negligence on the part of those furnishing the engine and tank complained of; and,

17. If same were unsafe and defective, it was unknown and could not have been known by the use of ordinary diligence, and was a risk incident to the employment.

18th. Special answer setting up order of final discharge, wherein it appears that said cause was retained in court for the purpose of investigating the liabilities of said receiver and providing for their payment upon proper intervention.

Upon a hearing the court overruled the general demurrer and all special exceptions, except Nos. 3 and 10. The cause was tried before a jury on the 2nd day of December, 1890, and resulted in a verdict and judgment against the Texas & Pacific Railway Company for $7,500. (Tr., 23.)

Motion for new trial overruled; the Texas & Pacific Railway Company prosecuted its appeal.

It was further made to appear both from the pleadings and evidence that appellant's line of railroad extended through and into various counties in the State of Texas and of Louisiana.

Questions.

First. Did the circuit court of the United States sitting in and for the district of Louisiana have jurisdiction to take possession through a receiver of that part of the road situated in the State and northern district of Texas?

156 Second. If no such power existed, would the negligent act of a receiver thus appointed, resulting in death while operating the road in Parker county, Texas, make the company liable?

Third. Would the company be liable for such negligent act if the receiver was appointed and discharged and the property restored to it by consent and collusion, as alleged by appellees, whether the court making the appointment had or did not have the requisite jurisdiction? And if the court had jurisdiction, could that issue be made available in this suit?

Fourth. If a collusive and fraudulent receivership was shown, or, rather, if that was the proper deduction from the undisputed evidence, was the court required to submit the issue to the jury before a judgment could be entered on a general verdict finding negligence?

Fifth. In what, if any, state of the case as above set forth would appellees be precluded from disputing the validity of the appointment of the receiver, the deceased fireman having contracted with him in that capacity?

Sixth. In any state of — case as above set forth would the statute of limitation preclude a recovery?

Seventh. If appellant could be held liable for the death loss in question on the ground of a collusive and void receivership, as alleged, upon a verdict finding that issue in favor of appellees, should the judgment be reversed for fundamental error where the pleading and proof raised the issue and no error is assigned for failure to submit it to the jury?

Eighth. As deceased was killed since the act of Congress of March 3rd, 1887, relating to Federal receiverships, what effect, if any, did it have on the issues involved as set up in the pleadings?

To certify which witness my official signature and seal of said court, in the city of Ft. Worth, this the 25th day of Nov., A. D. 1893.

B. D. TARLTON,
Chief Justice Court of Civil Appeals,
2nd Supreme Judicial Dist. of Texas.

Indorsed: Texas & Pacific Railway Co. *vs.* Nancy J. Gay. Certified questions to supreme court from court of civil appeals, second district. Filed in supreme court November 28, 1893. Decided April 30, 1894.

157 *Opinion of Supreme Court on Certified Questions.*

TEXAS & PACIFIC RAILWAY CO. *vs.* NANCY J. GAY. } No. 70. (Certified Questions from Second District.)

This action was brought by the wife and minor child of John M. Gay to recover from John C. Brown, as receiver for the Texas & Pacific Railway Company, damages for an injury received by him while in employment of the receiver, which resulted in his death.

At the time the action was brought John C. Brown was operating the Texas & Pacific railway as receiver under appointment made by the circuit court of the United States sitting for the eastern district of the State of Louisiana; but pending the litigation the receiver was discharged.

After the discharge of the receiver, with pleadings setting up that fact, a judgment was rendered against him, which, on appeal, was reversed. Brown *vs.* Gay, 76 Tex., 444.

After this the pleadings were amended, and thereby the Texas & Pacific Railway Company was made a defendant; but this did not occur until more than one year had elapsed after the death of John M. Gay. The pleadings show a state of facts which would have entitled John M. Gay to have maintained his action against the railway company for the injury had he lived; but as it has been held that actions for injuries resulting in death could not be maintained against receivers under the law as it was when the injury and death in question occurred, questions have been certified to this court under pleadings and a judgment against the railway company which make them pertinent.

The questions will be considered in their order:

"First. Did the circuit court of the United States for the district of Louisiana have jurisdiction to take possession through a receiver of that part of the road situated in the State and northern district of Texas?"

158 The Texas & Pacific Railroad Company was chartered by an act of Congress approved March 3, 1871, by which it was "empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, county of Harrison, State of Texas; thence by the most direct and eligible route, to be determined by said company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona to a point on the Rio Colorado at or near the southeastern boundary of the State of California; thence by the most direct and eligible route to San Diego, California, to ships' channel in the bay of San Diego, in the State of California." Sec. 1, act 1871.

By the fourth section of the act the company was empowered "to purchase the stock, land grants, franchises, and appurtenances of

and consolidate on such terms as may be agreed upon between the parties with any railroad company or companies heretofore chartered by congressional, State, or territorial authority on the route prescribed in the first section of this act."

The ninth section of the act provided for a grant of lands to the company for so much of its road as was to be constructed through the Territories of the United States and the State of California.

The twenty-second section of the act provided "that the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect, by the most eligible route, to be selected by said company, with the said Texas Pacific railroad at its eastern terminus, and shall have the right of way through the public lands to the same extent granted hereby to the said Texas Pacific Railroad Company; and in
159 aid of its construction from New Orleans to Baton Rouge, thence by way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile in the State of Louisiana as are by this act granted in the State of California to said Texas Pacific Railroad Company."

The seventeenth section of the act required the construction of the road to commence "simultaneously at San Diego, in the State of California, and from a point at or near Marshall, Texas, as hereinbefore described, and so prosecute the same as to have at least fifty consecutive miles of railroad from each of said points complete and in running order within two years after the passage of this act, and to so continue to construct each year thereafter a sufficient number of miles to secure the completion of the whole line from the aforesaid point on the eastern boundary of the State of Texas to the bay of San Diego, in the State of California, as aforesaid, within ten years after the passage of this act."

Congress passed a supplementary act, which was approved on March 2, 1872, and the first section of that changed the name of the corporation to "the Texas & Pacific Railway Company."

The fifth section declared "that the said Texas & Pacific Railway Company shall commence the construction of its road at or near Marshall, Texas, and proceed with its construction under the original act and this supplement, or in pursuance of the authority derived from any consolidation as aforesaid, westerly from a point near Marshall, and towards San Diego in the State of California, on the line authorized by the original act, and so prosecute the same as to have at least one hundred consecutive miles of railroad from said point complete and in running order within two years
160 after the passage of this act; and so continue to construct each year thereafter, a sufficient number of miles, not less than one hundred, to secure the completion of the whole line, from the aforesaid point on the eastern boundary of the State of Texas to the bay of San Diego in the State of California, as aforesaid, within ten years after the passage of this act; and the said road from Marshall, Texas, throughout the length thereof, shall be of uniform gu*a*ge."

After providing for construction from San Diego eastward the section contains the following: "Provided, that said Texas & Pacific Railway Company shall be and is hereby authorized and required to construct, maintain, control and operate a road between Marshall, Texas, and Shreveport, Louisiana, or control and operate any existing road between said points of the same *guage* as the said Texas & Pacific railroad; and that all roads terminating at Shreveport shall have the right to make the same running connections, and shall be entitled to the same privileges for the transaction of business in connection with the said Texas & Pacific railway as are granted to roads intersecting therewith: Provided further, that nothing herein shall be construed as changing the terminus of said Texas & Pacific railway from Marshall as provided in the original act."

The Southern Pacific Railroad Company was chartered by the laws of this State and was empowered to construct, own, and operate a railway from the eastern boundary of Texas to El Paso. Special Laws 1852, p. 197; Special Laws 1856, p. 76; Special Laws 1860, p. 130. The Southern Transcontinental Railway Company was also chartered under the laws of this State and empowered to construct a railway from a point on the eastern boundary of Texas to its western boundary. Special Laws 1870, p. 40; Special Laws 1871, p. 92.

These corporations were authorized to consolidate with the Texas & Pacific Railway Company. Special Laws 1871, p. 489.

161 Under this and the act of Congress before referred to the consolidation of these roads was effected, and Congress, by an act approved June 22, 1874, ratified the consolidation and declared that the "roads so merged as aforesaid shall for that and all other purposes be deemed and taken to be a part of the said Texas & Pacific railway, and shall hereafter be subject to all the provisions and limitations of the act of Congress incorporating said company and of the supplement thereto."

These are the laws under and by virtue of which the Texas & Pacific Railway Company exists, and it is evident from these that the eastern terminus of that road is at the eastern line of the State of Texas, and that no part of it is in the State of Louisiana.

It is true that the supplementary act, as well as the original, contemplated that through some other road connections between the terminus of the Texas & Pacific railway and Shreveport, in the State of Louisiana, should be made, and to that end the later act required that company to make such a connection through a good road to be built, controlled, and operated by it or by some existing road between those points of which it might be able to obtain control; but that act expressly declares that "nothing herein shall be construed as changing the terminus of said Texas & Pacific railway from Marshall, as provided in the original act."

Both acts proceed upon the seeming assumption that the town of Marshall was at the eastern boundary of the State of Texas, but in view of the questions submitted it is immaterial whether the terminus be at once place or the other, for they are both in this

State. The original act evidently contemplated that there would be a connection between the eastern terminus of the Texas & Pacific railway and the Mississippi river through the New Orleans, Baton Rouge & Vicksburg railroad, and to that end and to secure that provided for a grant to that company of public lands situated
162 in Louisiana; but no grant of public lands was contemplated for any road the Texas & Pacific Railway Company might construct from its eastern terminus to Shreveport.

Congress had power to authorize the Texas & Pacific Railway Company to construct a railway other than that which it declared should be the Texas & Pacific railway and to operate and control it, and at the same time to declare that the one should not be part of the other.

Where the terminus of a railway is under the terms of its charter, there it necessarily exists in fact as well as in law, and the fact that the company may be authorized to construct and operate a railway beyond that terminus cannot make the two one.

A case is not presented in which one railway, under the terms of its charter, extends through or into two or more States, in one of which a receiver over the entire road was appointed by a court sitting in a State in which part of the road was, but the case is one in which a receiver was appointed by a circuit court of the United States sitting in and for the eastern district of Louisiana to take possession of, operate, and control a railway no part of which was in the State of Louisiana.

The appointment of a receiver by a court of general jurisdiction ought to be held conclusive of the power of the court to make the appointment when that is called in question collaterally, unless it appears that in the particular case the court was without jurisdiction.

Jurisdiction must depend on the laws creating the court and prescribing its powers, and if it attempts to exercise a power not thus conferred its judgments and decrees are not binding, even upon parties, and may be declared inoperative by any other tribunal in which effect is sought to be given to them. If the fact on
163 which jurisdiction depends is determined by law, then resort to presumptions ordinarily indulged in favor of the power of a court of general jurisdiction which has assumed to act in a given case is neither necessary nor admissible.

In the matter now under consideration it appears through a positive law creating the Texas & Pacific Railway Company and fixing the locality of its road that no part of that extends into the State of Louisiana, and the inquiry is presented whether the circuit court of the United States sitting in a district in that State has jurisdiction to appoint a receiver with power to take possession of a railway situated in this State and to control and operate it under its orders.

The importance of avoiding conflict between the courts of the United States and the State courts cannot be overestimated, but such harmony as should exist between them will be most surely preserved if strict regard by each for its own jurisdiction be ob-

served, for usurpation of power by either will necessarily bring conflict. Where one has assumed the power to act in a given case every lawful presumption that it did not act without jurisdiction ought to be indulged, but when it is clear that either has acted without lawful power the other, when called upon to adjudicate the rights of litigants, cannot refuse to make inquiry even as to jurisdiction of the other when this becomes necessary to the determination of the question before it without surrendering power conferred upon them for the preservation of the rights of litigants before them.

For present purposes it will be assumed that the Texas & Pacific Railway Company exists by reason of its incorporation by acts of Congress, and that this is not effected by reason of its consolidation with corporations created under the laws of this State and the acquisition of rights through consolidation.

164 The Texas & Pacific Railway Company having been incorporated by acts of Congress, it is probably true that the circuit courts of the United States would not have jurisdiction of controversies between it and others on the ground of diverse citizenship. Hepburn *vs.* Ellzny, 2 Cranch., 445; New Orleans *vs.* Winter, 1 Wheaton, 91.

It has, however, been held in effect that such courts have jurisdiction over litigation to which such corporations are parties on the ground that they were so chartered and without reference to the character of the questions on which the right of litigation may depend. Texas & Pacific Railway Co. *vs.* Kirk, 115 U. S., 2.

In a case in which such a corporation is a party jurisdiction of a circuit court of the United States ought to be presumed, if the action be not one local in its nature or the relief sought in whole or in part be not such as can be given only by a court sitting where property is situated, through which the court's judgment may be enforced.

The purpose for which the suit was brought in Louisiana by the Missouri Pacific Railway Company against the Texas & Pacific Railway Company is not fully set out in the statements made in connection with the questions certified, but it appears therefrom to have been such in form as it should be presumed made it proper for some court to appoint a receiver with power to take possession of the railway and property necessary to its operation belonging to the latter and these to control and operate under its orders.

Under circumstances somewhat various receivers may be appointed, but this can never be lawfully done unless necessary for the preservation of property, the preservation or enforcement of rights of persons having claims against it, or to have it applied to some lawful purpose from which it has been or is likely to be diverted if the court does not take possession of it through a receiver

165 and so cause it to be applied or managed as may be deemed by the court most beneficial to all persons interested, having due regard for fixed rights.

The intention of Congress, as a general rule, to limit the jurisdiction of circuit courts of the United States to powers and things within the district in which the court sits, as well as to restrict their

process, whether original or final, to the same territory, is manifested by several statutes.

It is provided that "except in the cases provided for in the next three sections, no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and except in the said cases provided — by the preceding sections, no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process, in any other district than that of which he is an inhabitant or in which he is found at the time of serving the writ." R. S., 739. That was amended by the act of Congress approved March 3, 1887, which was corrected by the act approved August 13, 1888, and the amendment, without changing the other parts of the statute, withdraws the right to maintain an action in a district in which a defendant is found at the time of serving the writ, and adds that "when the jurisdiction is founded only on the fact that the action is between citizens of different States, suit may be brought only in the district of the residence of either the plaintiff or the defendant." This statute furnishes now the general rule. The exceptions referred to are as follows:

"When a State contains more than one district, every suit not of local nature in the circuit or district courts thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought
166 in either district and a duplicate writ may be issued against the defendants directed to the marshal of any other district in which any defendant resides."

The section further provides that on "judgment or decree rendered therein execution may be issued directed to the marshal of any district in the same State." R. S., 740.

"In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides." R. S., 741.

"Any suit of a local nature, at law or in equity where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the circuit or district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause means or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted." R. S., 742.

These laws are, in express terms, made applicable only to circuit or districts courts sitting in different districts in the same State and has no application whatever either to jurisdiction or process of a circuit court sitting in one State in reference to persons or property situated in another State.

Circuit courts of the United States having only such jurisdiction as Congress has conferred upon them, those statutes bear evidence

of a broad recognition by Congress, not only of the impropriety of permitting the adjudication of rights to or in reference to property situated in one State by a court sitting in another, but also of the propriety of having the rights of citizens adjudicated by
167 courts sitting in the States of which they are citizens or inhabitants. The act of Congress further provides that:

"When any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought is not an inhabitant or not found within said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer or demur to the complainant's bill at a certain day, therein to be designated; and the said order shall be served on such absent defendant, if practicable, wherever found, or, when such personal service is not practicable, shall be published in such manner as the court shall direct." R. S., 738.

The statute further provides that under such citation the court may adjudicate the pending matter, but that "the said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only."

The proceeding here contemplated is essentially one *in rem* and might frequently be applicable in cases in which appointment of a receiver would be proper or even necessary, and it authorizes the process of the court to run beyond the district or even beyond the State in which the court issuing it sits for the sole purpose of giving notice to a defendant.

Act last referred to was amended by an act approved March 3, 1875, whereby the same rule was also made applicable to suits "to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought;" and it further provided "when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, suit may be brought in either district in said State."

168 This law, however, applies only to courts sitting in a district in which the property is wholly or partly situated, against which some claim specified in the act is asserted, and would not authorize the maintenance of such a suit or such use of process where the property, real or personal, is situated partly in one and partly in another district, unless both districts be in the same State.

Here we have a broad recognition of the rule that property, whether real or personal, can be affected only by judgments or decrees of courts sitting within the State in which the property is situated; that jurisdiction over that, as well as of the litigants, is essential, and that the former can exist only by reason of the fact that the property is situated within the territory over which the court is given jurisdiction, and the latter by service of process made in the manner prescribed by law. If there be any other act of Congress under which, in litigation between persons or between

them and corporations, the process of a circuit court of the United States is authorized to run beyond the limits of the State in which the court is authorized to sit, attention has not been called to it.

By act approved March 3, 1881, two judicial districts were created in the State of Louisiana, and the courts for the eastern district were thereby required to be held in New Orleans, while those for the western district were required to be held at four places named in the act, one of which was Shreveport.

That act recognizes the fact that all suits of a local nature must be brought in the district in which the thing to which it relates is situated, and secures to every inhabitant of that State who is a sole defendant exemption from suit in a district other than that in which he resides.

By acts of August 8, 1888, the districts in Louisiana were
169 subdivided, and in cases in which there are defendants residing in different divisions process is authorized to reach them, and, while these statutes have no direct bearing on the question presented, they show that Congress deemed it necessary, even in such cases, to authorize process to run beyond the division in which the court issuing it sat.

The rule that ordinarily a receiver appointed by a court having jurisdiction to make the appointment is an officer of that court, having only such power as the order of the court under the general principles of law and due course of procedure may confer upon him or such as may be conferred upon him by statute; that his possession is the possession of the court and property thus placed in his hands is in *custodia legis*, is so fully recognized that citation of authorities in support of the rule seems unnecessary. Prominent among the decisions so holding is the case of Booth *vs.* Clark, 17 How., 331, and Davis *vs.* Gray, 16 Wall., 217.

From these considerations it must follow that a court cannot confer upon a receiver power outside of the territory over which it has jurisdiction, for its process cannot be effective beyond that unless authorized by statute to reach to other territory within the limits of the country to which the court belongs; and where the process of a court cannot go and be entitled to enforcement and respect its officers cannot have power. Northern Indiana Railroad Co. *vs.* Michigan Railroad Co., 15 How., 242; Ableman *vs.* Booth, 21 How., 524; Toland *vs.* Sprague, 12 Peters, 328; Pennoyer *vs.* Neff, 95 U. S., 714; Harkness *vs.* Hyde, 98 U. S., 476.

In Ableman *vs.* Booth it was truly said that "no judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued, and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

170 Whether want of jurisdiction arises from the fact that the thing to be affected by judgment and process of a court is without its territorial jurisdiction or without its jurisdiction for any other reason is unimportant, for in either case the process is invalid because the court has not jurisdiction.

This brings us to the inquiry whether the circuit court for the

United States sitting in and for a district in the State of Louisiana had jurisdiction to appoint a receiver and through him to take possession and control of a railway, no part of which was in the State or district in which the court was authorized to sit, but of which a part at least was in this State.

Such an inquiry must be determined by the laws of the United States creating circuit courts and determining their jurisdiction, and, without making further particular reference to the statutes regulating that matter, the decisions of the Supreme Court of the United States bearing on that question will be briefly noticed.

As before said, the jurisdiction of that court over an action transitory or personal in its nature between the two railroad corporations will be conceded; for if the defendant in that suit could not for any reason have been compelled to appear in that court, that was a matter it might waive.

In Toland *vs.* Sprague (12 Peters, 328) it was said: "The judiciary act has divided the United States into judicial districts. Within those districts a circuit court is required to be holden. The circuit court of each district sits within and for that district, and is bound by its local limits. Whatever may be the extent of their jurisdiction over the subject-matter of suits in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court to have run into any State of the Union. It has not done so.
171 It has not in terms authorized any original civil process to run into any other district, with the single exception of subpœnas for witnesses within a limited distance. In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment is rendered—one in favor of private persons in another district of the same State, and the other in favor of the United States, in any part of the United States. We think that the opinion of the legislature is thus manifested to be that the process of a circuit court cannot be served without the district in which it is established, without the special authority of law therefor."

In Railroad Co. *vs.* Railroad Co. (15 How., 233) it appeared that a railway company in Michigan, incorporated under the laws of that State, made an agreement with a railway company in and incorporated by the laws of Indiana, whereby the latter agreed that the former might build and operate a road in Indiana under the charter of the latter.

Another railway company, also established by the law of Indiana, claimed the exclusive right to construct and operate a road in that part of Indiana, and it brought a suit in the circuit court of the United States for the district of Michigan against the Michigan road, in which injunction was sought to restrain that company from constructing a road under the contract, in violation of the exclusive right claimed by the plaintiff.

In disposing of the case the court said: "In this case we shall consider the question of jurisdiction in regard to the district only. In all cases of contract suit may be brought in the circuit court

where the defendant may be found. If sued out of the district in which he lives, under the decisions he may object, but this is a privilege which he may waive. Whenever the jurisdiction of the person will enable the circuit court to give effect to its judg-
172 ment or decree, jurisdiction may be exercised, but whenever the subject-matter in controversy is local and lies beyond the limit of the district, no jurisdiction attaches to the circuit court sitting within it. An action of ejectment cannot be maintained in the district of Michigan for land in any other district, nor can an action of trespass *quare clausum fregit* be prosecuted where the act complained of was not done in the district.

Both of these actions are local in their character, and must be prosecuted, where the process of the court can reach the *locus in quo*."

It was insisted in that case, as in others which will be hereafter considered, that the court having jurisdiction of the persons could enforce its judgment by acting upon them, which would seem to be true, as injunction only was sought, if there was no other obstacle to the exercise of such jurisdiction; but after indicating the class of cases in which the court could thus enforce its judgments the court said: "It will readily be admitted that no action at law could be sustained in the district of Michigan on such ground for injuries done in Indiana. No action of ejectment or for trespass on real property could have a more decided local character than the appropriate remedy for the injuries complained of. And is this character changed by a bill in chancery? By such a procedure we acquire jurisdiction of the defendants, but the subject-matter being local, it cannot be reached by a chancery jurisdiction exercised in the State of Michigan."

A suit was brought in the circuit court for a district in Tennessee to cancel a contract for the sale of land in Mississippi, to recover money paid on the contract, and to enjoin the adverse party from enforcing it.

The relief asked was granted, but the court attempted to establish a lien on the land in Mississippi and directed it to be sold
173 by persons acting under its appointment, to satisfy the judgment rendered in favor of the plaintiff; but, on appeal, it was held that "the court had no jurisdiction to decree a sale to be made of land lying in another State by a master acting under its own authority," and that it had no power to create a lien on the land. Boyce *vs.* Grundy, 9 Peters, 289.

In Railroad *vs.* Ward (2 Black, 485) it was held that a district court of the United States for the district of Iowa had not jurisdiction to abate as a public nuisance a bridge across the Mississippi river, the middle of that stream being the boundary between the States of Iowa and Illinois, and in the course of the opinion it was said: "Congress could extend the jurisdiction of the Federal courts across the Mississippi river by enlarging the judicial districts on either side, or it could confer concurrent jurisdiction on adjoining districts, extending to trespassers and torts committed within the

shores of the river; but the courts of justice cannot do it unless authorized by an act of Congress."

The direct purpose of all judicial action is relief to a litigant, which cannot be given by a judgment or decree alone, but must be given, if at all, through the enforcement of the one or the other by appropriate process; and the highest test of the jurisdiction of a court in a given case is found in the answer to an inquiry whether it has lawful power thus to enforce its judgment or decree.

This rule is thus clearly expressed by the court of appeals of Maryland: "It would be an idle thing in chancery to entertain jurisdiction of a matter not within its reach and make a decree which it could have no power to enforce or to compel a compliance with; and the absence of that very power is a good test by which to try the question of jurisdiction. It would be a solecism to say
174 that the chancellor has jurisdiction to decree *in rem* where the thing against which the decree goes and is alone the subject of and to be operated upon by it is beyond the territorial jurisdiction of the chancery court and not subject to its authority, and the decree, if passed, would itself be nugatory for the want of power or jurisdiction to give it effect." White *vs.* White, 7 Gill & J., 210.

There are classes of cases, however, in which courts of chancery may, through action on persons over whom they have jurisdiction, indirectly affect title to property, real or personal, situated in a State not within their jurisdiction.

Such a jurisdiction, however, is tentative in character and necessarily precarious, for it depends for effect on obedience of a defendant, and may be defeated if he be unyielding.

If in the exercise of such jurisdiction a foreign court, by imprisonment or like coercion, should compel a conveyance when, by the laws of the country where the property is, no right to a conveyance existed, then a court of the country having jurisdiction over the property might disregard a conveyance made under such circumstances.

An eminent writer thus states the rule which has been recognized: "Where the subject-matter is situated within another State or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which directly affect and operate upon the person of the defendant and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts towards it, and it is thus ultimately, but indirectly, affected by the relief granted. As examples of this rule, suits for spe-
175 cific performance of contracts, for the enforcement of express or implied trusts, for relief on the ground of fraud, actual or constructive, for the final accounting and settlement of a partnership, and the like, may be brought in any State where jurisdiction of defendant's person is obtained, although the land or other subject-matter is situated in another State or even in a foreign country. On the other hand, when the suit is strictly local, the subject-matter is specific property, and the relief when granted is such that it must

act directly upon the subject-matter and not upon the persons of the defendant; the jurisdiction must be exercised in the State where the subject-matter is situated." Pomeroy's Equity, 1318; Wharton's Conflict of Laws, 288–293.

This rule has been recognized by the Supreme Court of the United States and by the decisions of the State courts. Massie *vs.* Watts, 6 Cranch, 148; Caldwell *vs.* Carrington, 9 Peters, 97; Watkins *vs.* Holman, 16 Peters, 26; Railroad Co. *vs.* Railroad Co., 15 How., 243; Corlett *vs.* Nutt, 10 Wall., 475; Pennoyer *vs.* Neff, 95 U. S., 723; Watts *vs.* Waddle, 6 Peters, 389; White *vs.* White, 7 Gill & J., 211; Vaughan *vs.* Barclay, 6 Wheaton, 392.

In Watkins *vs.* Holman it was said: "A court of chancery acting *in personam* may well decree the conveyance of land in any other State and may enforce their decree by process against the defendant; but neither the decree itself nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court."

The property in controversy in that cause was situated in the State of Alabama, and the owner thereof sold one-half of the property and gave bond to make title, after which, without making title, he died. Administration was taken out on his estate in Massachusetts, and under an act of the legislature of Alabama the administratrix was authorized to sell the real estate situated in that State.

The holder of the bond for title brought a suit in the su-
176 preme judicial court of Massachusetts, praying that court to empower the administratrix to make title to him in accordance with the bond, and such an order was made and complied with.

It was with reference to a deed made under such circumstances that the language above quoted was used.

The case of Corlett *vs.* Nutt was one which made it proper to inquire whether the supreme court of the District of Columbia had power to appoint a trustee for land in Virginia in place of a trustee in whom title had vested under a will, that person declining to accept the trust, and, in holding that the court had not such power, the same ruling was made as in Watkins *vs.* Holman.

Jurisdiction of courts of equity, even in the classes of cases referred to, exists only when the relief sought is such that it may be given by the act of the person over whom the court exercises jurisdiction, and it is probably true that no decision made by an English or American court in modern times holds that such jurisdiction exists for the purpose of compelling a person, by conveyance or otherwise, to place property situated in a jurisdiction essentially foreign to it under the control of a court in order that it may administer it through a receiver or otherwise.

The law is thus stated by a distinguished elementary writer: "The claim, to affect foreign lands, must be strictly limited to those cases where the relief decreed can be entirely obtained through the parties' personal obedience; if it went beyond that the assumption would not only be presumptuous, but ineffectual." Westlake's Private International Law, art. 65.

That Judge Story, to say the least, doubted the existence of such jurisdiction even with this limitation is evident. Story's Conflict of Laws, 543, 544, 545.

This seems necessarily to be a correct limitation of the rule, for otherwise a court in one State would have power to acquire
177 jurisdiction over lands situated in another.

If a person be under contractual obligation to convey lands, a court of equity having jurisdiction over his person may compel him to make the necessary conveyance, although the land is in another State; but in such case the decree and process through which it is enforced creates no right to the thing and only enforces the specific right created by the contract.

The same jurisdiction may be exercised when land is held in trust, whether this arises from contract, devise, or fraud; but in such cases the court simply compels the person over whom it has jurisdiction to pass to another title to the specific thing on account of a fixed right to it existing when the suit was brought. If, however, the right or claim which a court in one State attempts to enforce against lands situated in another be one that arises from its decree and execution of its process, then the court is directly acting upon the thing over which it has not jurisdiction, and to such a case the rule cannot be applied. There are a few American cases which seem to hold that jurisdiction to compel a conveyance of land or other property situated in another State exists under facts last stated, and, while they have no direct application to the question certified, they are often cited to sustain the proposition that a court sitting in one State has jurisdiction to appoint a receiver and through him to take possession of real and personal property situated in another State.

They will be briefly considered in view of that fact.

The subject-matter involved in Mueller *vs.* Dows (94 U. S., 444) was a continuous line of consolidated railway, situated in the States of Iowa and Missouri, and a circuit court of the United States for a district in Iowa in foreclosure of a mortgage directed a sale of entire road by a master, the mortgagor and trustee, in whom it shows title was vested, being before the court. In the
178 course of the opinion it was said: "It is here undoubtedly a recognized doctrine that a court of equity sitting in a State and having jurisdiction of the person may decree a conveyance by him of land in another State and may enforce the decree by process against the defendant. True, it cannot send its process into that other State, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title; and there seems to be no reason why it cannot in a proper case affect the transfer by the agency of the trustees when they are complainants. In McElrath *vs.* The Pittsburg & Steubenville Railroad Co., 55 Penn. St., 189, a bill for foreclosure of a mortgage in which it appeared that a railroad company whose road was partly in Pennsylvania and partly in West Virginia had mortgaged all their rights in the whole road the court decreed that the trustee who had brought the suit, living within its jurisdiction, should sell and con-

vey all the mortgaged property, as well that in the State of West Virginia as that in Pennsylvania. This case is directly in point and tends to justify the decree made in the present case. The mortgagors here were within the jurisdiction of the court; so were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. This court might have ordered the trustee to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale and directed to make a deed to the purchaser in further assurance; and the court can direct the trustee to make a deed to the purchaser in confirmation of the sale."

Under similar facts the same ruling was made by the supreme court of errors of Connecticut in Mead *vs.* Railroad Co., 45 Conn., 233.

There are a few legal propositions bearing on the question of the existence of such a jurisdiction, to which the courts of the United States and of the several States all assent.

179 One of these is that jurisdiction over real property exists only in the tribunals of the country in which it is situated, and that it cannot be taken possession of or sold under the order, license, or decree of a court having jurisdiction only in another State. Wilkinson *vs.* Leland, 2 Peters, 654; Watts *vs.* Waddle, 6 Peters, 400; Boyer *vs.* Grundy, 9 Peters, 275; Watkins *vs.* Holman, 16 Peters, 26; Railroad *vs.* Railroad Co., 15 How., 233; State of Pennsylvania *vs.* Bridge Co., 18 How., 453; Railroad Co. *vs.* Ward, 2 Black, 485; Corlett *vs.* Nutt, 10 Wall., 475; Reynolds *vs.* Stockton, 140 U. S., 272; Lewis *vs.* Darling, 16 Pet., 13; Carpenter *vs.* Strange, 141 U. S., 105.

A decree foreclosing a mortgage and the process through which it may be enforced acts upon the mortgaged property directly. The sale when made is essentially a judicial sale, which has frequently been declared to be a sale by the court.

In Williamson *vs.* Berry (8 How., 546) a judicial sale was defined to be "one made under the process of a court having competent authority to order it by an officer legally appointed and commissioned to sell," and, unless the decree directs otherwise, the usual mode of procedure and the effect of each act are thus stated:

"The usual mode of selling property under a decree or order in chancery is a direction that it shall be sold with the approbation of a master in chancery, to whom the execution of the decree in that particular has been confided. It matters not whether the sale is public or private by a person authorized to make it, but that the approbation of the master in either case completes the title. Before, however, a purchaser can get a title he must get a report from the master that he approves the sale, or that he was the best bidder, accordingly as the sale may have been made either privately or at auction. The report then becomes the basis of a motion to the court by the purchaser that his purchase may be confirmed. Notice of the motion is given to the solicitor in the cause, and con-

180 firmation *nisi* is ordered by the court, to become absolute in a time stated, unless cause is shown against it. Then, unless the purchaser calls for an investigation of the title by the master, it

is the master's privilege and duty to draw the title for the purchaser, reciting in it the decree for sale, his approval of it, and the confirmation by the court of the sale in the manner that such confirmation has been ordered. We have been thus particular for the purpose of showing the office of the master in relation to a sale and what is meant by subjecting a sale to the approval of a master, and to show that such a sale, until approved by the master and confirmed by the court, gives no title to a purchaser of an estate which he may have bargained to buy."

In Blossom *v.* Railroad Co. (3 Wall., 207), in which sale under foreclosure of a mortgage came in question, it was said: "It is true that the marshal or master, as the case may be, is the officer of the court, and that as such his acts and proceedings are subject to the revision and control of the court. In sales directed by a court of chancery, says Judge Story, the whole business is transacted by a public officer, under the guidance and superintendence of the court itself. Even after the sale is made it is not final until a report is made to the court and it is approved and confirmed."

Reference to these matters has been made for the purpose of illustrating the proposition that judicial sales, whether made on foreclosure of mortgage or for some other purpose, are in effect sales made by the court directing the sale, and it is difficult to avoid the conclusion that the rule asserted in Muller *v.* Davis and other cases cited has no application in any case in which a sale of the thing is necessary before any person can become entitled to have it conveyed to him, for in such cases it is the decree, sale, confir-
181 mation, and payment of the purchase-money which give the right to the conveyance, and all these for efficacy must depend on the jurisdiction of the court, through its decree and process, to act directly upon the thing.

The fact that a person has executed a mortgage does not authorize any court to require him to convey the mortgaged property to the mortgagee or to any other person; nor does the fact that a mortgage gives power to a trustee named in it to sell the mortgaged property on failure of mortgagor to pay the sum so secured authorize him to convey on failure of mortgagor to make such payment; but, in either case, there must be a sale made under the mortgage before any person can become entitled to a conveyance. A deed is but evidence of a right; and in case of judicial sales a valid decree, sale by an authorized person, and confirmation are ordinarily essential to the right of a purchaser to a conveyance. These and compliance with the terms of sale create the right to a conveyance, and they can have no legal existence unless the court directing and confirming the sale had jurisdiction. The right of a purchaser at such sales rests on the fact that a sale was made in pursuance of decrees and orders made by a court in the exercise of lawful power over the thing sold, and not upon a prior right to the thing which the court simply enforces by compelling the adverse party to make a conveyance which he ought to have made without coercion; and there is at least a seeming inconsistency in holding that a court has power to decree a sale of property, cause it to be

sold by its own officer acting under its process, and to confirm the sale, but that to perfect the title of the purchaser it is necessary to compel the owner to make a conveyance.

No case can arise, unless under exceptional legislation, in which a court having jurisdiction to decree the sale of property and that to make under its own process has not power to pass what-
182 ever title the defendant has without resort to any aid whatever from him.

To lose jurisdiction to decree the sale of land and to sell it, although it be not situated within the territory over which the court has jurisdiction, on the proposition that the court has power in a different but proper case to compel a person before it to make a conveyance he is under obligation to make without reference to any action of the court, seems to us illogical, for the powers are not of the same character, nor the one in any respect dependent on the other. One is a power exercised directly on the person over whom the court has jurisdiction, while the other operates, if at all, as directly on the thing not within its jurisdiction, for, if the decree directing the sale and sale made under it be not given full effect, the purchaser can have no right to a conveyance. Substance and not form ought to be regarded.

No case can arise in which a court will have power to appoint a receiver unless there be property of which the court may take possession through its receiver, and if the property be immovable or movable, but so connected with the immovable as are cars or other like property necessary to and used in operating a railway, then the suit in which a receiver to take possession of them may be appointed is necessarily one local in character, for in such case the court operates directly upon the thing.

Such a proceeding is not one strictly *in rem*, but such is its nature, and under general rules everywhere recognized such proceedings can be had only where the thing to be taken into possession is within the territory within which the court has power to act.

The line between actions termed local and transitory in some of the decided cases becomes shadowy; but in no case can a suit the purpose of which is to subject certain property, whether
183 real or personal, to payment of a debt or to have it placed in possession of and under the control of a court for any purpose of administration be termed other than a local action.

The difference between local and transitory actions was thus stated in case of Mostyn *vs.* Fabrigus by Lord Mansfield: "There is a formal and a substantial distinction as to locality of trials. I state them as different things; the substantial distinction is where the proceeding is *in rem* and where the effect of the judgment cannot be had, if it be laid in the wrong place. That is the case of all ejectments where the possession is to be delivered by the sheriff of the county, and as trials in England are in particular counties the officers are county officers; therefore the judgment could not have effect if the action was not laid in the proper county."

It has sometimes been stated that the principles thus announced

furnished simply a technical rule in reference to venue, and that they had no bearing on the more substantial question of jurisdiction, but the language of the great judge is not susceptible of such a construction.

The case of British South Africa Company *vs.* Comhanhiade Mocambique (Appeal Cases, 602), decided in the House of Lords in the year last past, sets all such questions at rest, so far as the English courts are concerned. The opinion in that case may be read with profit on the question of extraterritorial jurisdiction of the courts of that country, and it is not without value as to the general claim for equity jurisdiction already considered.

The principles stated in Mostyn *vs.* Fabrigus met with the approval of Chief Justice Marshall in Livingston *vs.* Jefferson (1 Brockenboro, 209), and in defense to what he understood to be the difference between such actions at common law he felt constrained to hold that an action of trespass *quare clausum fregit* was a local action.

184 In Casey *vs.* Adams (102 U. S., 66) there was a fund in reference to which it became necessary to settle priorities between creditors, and a question arose whether this should be done by the court where the fund was or by a court sitting in the parish where the national bank to which the fund belonged was situated.

The act of Congress permitted suits to be maintained against such associations in the county or parish in which the bank was located, and it was contended that the proceeding could be maintained only in that parish.

In disposing of the question the court said: "The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribe generally where one should be sued included such suits as were local, either by statute or the common laws, unless it was expressly so declared. Local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated. * * * The proceeding in this case was local in its nature. It related to property in the parish of La Fourche, which had been seized and sold under process from the district court of that parish."

Under the laws of this State, as well as from the nature of the property itself, a railroad, which includes the right of way, rails, and all other material placed thereon or on other land used in connection therewith for permanent use, as well as all necessary structures, such as station-houses for storage of freight and accommodation of passengers, water tanks, and like structures, must be deemed real estate or immovable property; but the rolling stock and other movable property of such company is declared by the constitution to be personal property. Const., art. 10, sec. 4.

Under the settled rules of law can such property be taken possession of by a court having jurisdiction only in another State
185 if the property be situated in this?

Looking to the relation of rolling stock and other movable property necessary to the operation of a railway and to the public use of the entire property, the same reasons will be seen to apply for

holding such property subject to seizure, possession, or sale only by a court having jurisdiction within the territory where the property is situated as apply to the seizure, possession, or sale of immovable property, even if it could be held that the same rule in this respect does not apply to movable as well as to immovable property.

Whether the *lex rei sitæ* or the *lex domicilii* be applied to the movable property owned and used by the Texas and Pacific Railway Company is unimportant, for under neither was its *situs* in the State of Louisiana, unless there in fact, and if in course of railway traffic some of the movable property belonging to it was in fact in Louisiana when the receiver was appointed, that could not confer on the court making the appointment jurisdiction over property not so situated.

The same result would necessarily follow even if under the act of Congress or some law of the State of Louisiana the railway company had acquired and then possessed in the State of Louisiana property movable or immovable, unless it be the law that ownership and possession of property in one State with jurisdiction over the person of the owner is sufficient to confer upon a court only having jurisdiction therein power to take possession and control of other property situated in another State.

The act of Congress, as before seen, in effect declares that the eastern terminus of the Texas & Pacific railway shall be at Marshall
or at the eastern line of this State, and no railway east of that
186 line constitutes a part of that, even though it may be owned and operated by that company. If, however, the Texas & Pacific railway, as a continuous line under common ownership, extended into the district in which the circuit court making the appointment had jurisdiction, we do not see that under the acts of Congress before referred to it would have jurisdiction to appoint a receiver and through him or otherwise to take possession of that part of the railway situated in Texas, even if the decision in Mueller *vs.* Dows be correct when applied to the facts of that case, for that decision recognizes the law to be that the court "could not send its process into that other State, nor can it deliver possession of land in another jurisdiction."

If that court would not have power to place a purchaser in possession it certainly could not take possession through its receiver or otherwise, for the incapacity in the one case as in the other results from the absence of jurisdiction over the property.

If it were the ownership of property which gives a court jurisdiction over it, then it would exist whenever the court has jurisdiction over the person of the owner; but under the acts of Congress jurisdiction over property is not founded on ownership, but on the locality of the property, although ownership may become a controlling fact in settling the rights of parties.

This being true, that a part of a connected and entire property may be within the jurisdiction of the court cannot confer upon it jurisdiction to take possession or otherwise deal directly with that part situated in a State within which the court has not jurisdiction.

This is illustrated by the case of Railroad Co. *vs.* Ward, 2 Black., 485, and by other cases before referred to.

If the railway corporation could have been compelled to convey its property here situated to the court's receiver—a power
187 which the president and directors of the company or even its stockholders could not exercise under the laws of this State—this would not remove the difficulty as to jurisdiction, for if the receiver could thus be clothed with title to the property the disposition of it would rest on the decrees of the court appointing him, for these are the foundation of every judicial sale or disposition of property through a court when not made on account of an existing right to property through which the person to whom it ought to be conveyed is entitled to it without reference to the decrees of any court, and the receiver's possession would still be the possession of the court.

Let the matter be obscured as it may in such cases, the court acts directly on the property, sells it if it be sold, conveys it if it be conveyed, and possesses it if it be in any manner placed in the hands of its receiver.

In Mosely *vs.* Burrows (52 Tex., 396) it appears that a resident of the State of Arkansas brought an action in this State against a corporation in Tennessee, whose property there was placed in the hands of a receiver by a chancery court of that State. The corporation had lands here which were attached after they had been conveyed to the receiver under the order of the court that appointed him by the officer of the corporation to whom the lands had been conveyed in trust for it, and in the action here the receiver asserted right to the land against the attaching creditor. The supreme court of this State refused to recognize his right or the jurisdiction of the court that appointed him to affect in the manner attempted lands situated in this State, and applied the rules announced in Booth *vs.* Clark and in other cases cited in the opinion.

In Morris *vs.* Hand (70 Tex., 481) it appeared that Hand made a contract with Fox, such as could be specifically enforced, to convey lands in Texas, and they both being residents of Mont-
188 gomery county, in the State of New York, Fox obtained a decree from the supreme court of that county directing Hand to make to him a conveyance or to pay a named sum of money.

Hand did not comply with the decree, but was subsequently adjudged insane, and Brown was appointed committee of his estate, and, in pursuance of a decree directing him to do so, Brown conveyed the land to Fox.

In a controversy here between the heirs of Hand and a person holding under the conveyance made by Brown it was held to be "settled without conflict of authority that courts of one country or State have no authority under any circumstances to direct the title to real estate situated in a foreign State or country or to direct the sale of such land to be made by any one occupying a fiduciary capacity."

The opinion, however, recognized the rule that in proper cases

such relief might be given through personal process against the person who had obligated himself to convey.

Decisions doubtless may be found in which it was held in England, at an early day, that chancery courts of that country had power to appoint receivers and take possession through them of property in Ireland, in the colonies, and in countries having no governmental connection with England, but, as said in Booth *vs.* Clark, "orders have been given in the English chancery for receivers to proceed to execute their functions in another jurisdiction, but we are not aware of its ever having been permitted by the tribunals of the east."

It would be useless to speculate upon the theories upon which the English courts proceeded in asserting such a jurisdiction, but, so far as we are advised, it has not been asserted or enforced in any recent case, and, except as permitted by acts of Parliament,
189 it probably would not be asserted even within territory part of the British Empire outside of England.

As early as 1834 such a jurisdiction was denied by an Irish chancery court, which refused even to give to a decree rendered by a chancery court in England such *prima facie* effect as to permit it to be made the basis of a suit affecting property situated in Ireland, or to carry out its decree appointing a receiver to manage property there. While the opinion of the Lord Chancellor, in the House of Lords, seemed to assert such jurisdiction in an English chancery court, that high tribunal, on appeal from the decree of the Irish court, remitted the entire case to that court for decision and directed it to have a receiver appointed. Houlditch *vs.* Donegal, 8 Bligh., 301.

If, however, under the laws of England chancery courts may exercise such jurisdiction over property situated in any part of the British Empire, that would furnish no criterion by which to test the territorial jurisdiction of a circuit court of the United States, which can exist only when and where Congress has conferred it. A circuit court of the United States for a district in Louisiana, unless it be conferred by some act of Congress, has no greater power over property here than would have any court of Louisiana possessing general equity jurisdiction, and that Texas and Louisiana are in the same circuit is of no importance.

It is true that some of the circuit courts of the United States have asserted power to appoint receivers for continuous lines of railway extending through two or more States, and through them to take possession of such parts of railways as were without the State in which the courts were given jurisdiction, and some reference will be made to the cases, from which it will be seen that their rulings are not harmonious.

In Wilmer *vs.* The Atlantic & Richmond Air Line Railway Co. (2 Woods, 417), a receiver was appointed to take possession of
190 a railway belonging to one corporation extending into or through three States. The appointment was made by a circuit court in Georgia, and its ruling was based on the assumed

power of the court acting upon the owner to compel submission to its jurisdiction.

The only case cited in support of the ruling, other than such as assert the power of courts of equity, already considered, was the case of Ellis *vs.* Railroad Co. (107 Mass., 1), which was a case in which it appears that the supreme court of Massachusetts on original bill appointed receivers of a road situated in and incorporated by the laws of that and other States, but no question was raised or considered as to the power of the court to do so, and the receivers were subsequently removed and the railway placed in the hands of trustees, who were entitled to its possession and management under the terms of the mortgage which it was the purpose of the bill to foreclose.

While application for appointment of a receiver was pending in case of Wilmer *vs.* Railroad Company, a court of the State of Georgia appointed a receiver over so much of the road as was in that State, and like steps were taken by circuit courts of the United States in each of the other States through or into which the railroad ran.

Application was made to the circuit court sitting in Georgia by its receiver for writ of assistance to put him in possession of so much of the road as was in possession of the receiver appointed by the State court, but no such relief seems to have been asked as to other parts of the road which were in the possession of a receiver appointed in the other States. The application was disposed of by an opinion written by Circuit Justice Bradley, in which it was held that the State court was entitled to possession because its possession was prior, notwithstanding action looking to the
191 appointment of a receiver was first commenced in the circuit court.

No question was raised or discussed as to the jurisdiction of the circuit court over so much of the road as was without the State of Georgia, but from the opinion it is difficult to resist the conclusion that the eminent judge did at least entertain serious doubt of the power of the circuit court to appoint a receiver over so much of the road as was not in that State.

In case of Wabash, St. L. & P. R'y Co. *vs.* Central Trust Co. a circuit court of the United States for the eastern district of Missouri appointed receivers over a railway which ran through the States of Missouri, Illinois, and Indiana and into the States of Ohio, Michigan, and Iowa, who under its orders took possession of the entire road.

The bill under which this was done was filed by the railway company, but subsequently trustee, in a general mortgage, filed a cross-bill, asking foreclosure.

Bills similar to that filed in the court in Missouri seem to have been filed in circuit courts in Illinois, and perhaps in other States, for the purpose of having, as seems to have been usual at the time, the same receivers appointed in each jurisdiction, and this was done; but, as is to be inferred from a case hereafter to be noticed, this was not done for the purpose of having the property situated in Illinois

administered by the circuit courts sitting in that State, but for the purpose of giving effect to the appointment made by the circuit court in Missouri.

After these transactions occurred bondholders brought suits in the circuit court of the United States for the northern district in Illinois to foreclose mortgages held to secure the bonds held by them, in which it was asked that the receivers appointed by the circuit court for Missouri should be removed and some other person appointed.

192 The court entertained jurisdiction over so much of the property as was within the district, removed the receivers theretofore appointed by the circuit court in Missouri, and appointed another, but refused to exercise jurisdiction over so much of the property as was within the same State, but in another district.

In disposing of the question the court said "that courts of equity cannot acquire extraterritorial jurisdiction over property by appointing receivers," cited Booth *vs.* Clark as authority, and held that the decision in Muller *vs.* Dows did not justify the procedure of the circuit court for Missouri. Atkins *vs.* Railway Company, 29 Fed. Rep., 162.

The court in Missouri in effect rescinded so much of its order as applied to the property over which the court in Illinois took jurisdiction and gave possession to the receiver appointed by the latter, but insisted that the decision in Muller *vs.* Dows was conclusive of the propriety and legality of its former action. Central Trust Co. *vs.* Railway Co., 29 Fed. Rep., 618.

In Beers *vs.* Railway Co. (26 Am. & Eng. Railway Cases, 441) substantially the same facts were involved and the same result was reached.

In case of Blackburn *vs.* Railway Co. (2 Flippen, C. C., 525) it appears that the legislatures of Alabama, Mississippi, and Tennessee each incorporated railway companies bearing the same name, the act of incorporation in States last named being identical, but it does not clearly appear from the opinion whether all the acts authorized consolidation of the three corporations. The railways were constructed and the companies consolidated so far as they were authorized, after which bonds were issued secured by mortgage on the railway.

193 Suit was brought on some of the bonds in which foreclosure was asked in the circuit court of the United States for the northern district of Tennessee, and that court appointed a receiver over the railway situated in the three States, but he failed to get possession of that part in the State of Alabama, which was placed in the hands of a receiver by a court of that State and subsequently sold in foreclosure of mortgage. The court held that it had jurisdiction to appoint the receiver, to foreclose the mortgage on the railway in the three States, and to sell it.

The case of Muller *vs.* Dows was again relied on in support of the jurisdiction claimed, and the same course of reasoning followed in that case was adopted.

If the court in Alabama under whose decrees a receiver was ap-

pointed and the property sold had jurisdiction of the proper persons to make a decree which would bind the property, what would be the relative rights of a purchaser under the decree made by that court and a purchaser under decree rendered by the circuit court in Tennessee if their rights were not affected by priority of mortgage?

The Mercantile Trust Company filed a bill in the circuit court of the United States for the southern district of Ohio against the Kenawha & Ohio Railway Company, a corporation existing under the laws of Ohio and West Virginia, a part of whose road was in each State, for the purpose of foreclosing a mortgage, and a receiver was appointed.

Subsequently a bill was filed in the circuit court of the United States for West Virginia, which consisted of a copy of the bill filed in the court in Ohio, with prayer that the court take ancillary jurisdiction, and asking that the court confirm the order of the court in Ohio appointing a receiver of the entire property and make such orders as might be necessary to give him possession and control of it.

194 The purpose of the proceeding in West Virginia is thus stated by Mr. Justice Harlan: "The purpose of the parties by whom or at whose instance the suit here was instituted was to have the entire mortgaged property administered under the orders of the court in Ohio, in which the suit for foreclosure was brought, and that nothing was desired or expected from this court except an order approving or confirming the appointment of Kelley as receiver and such other orders as may be necessary to vest in him the possession and control of such of the mortgaged property as was in this district."

The case of Muller *vs.* Dows was relied upon again as authority for the action of the court in Ohio, but it was held not to be applicable.

The learned judge then declares if the plaintiff "desires the active intervention of this court in respect to the mortgaged property in West Virginia, such intervention should only occur in a separate, independent suit, of which it may take cognizance, and in which, if proper or necessary to do so, this court may lay its hands upon the property within this district, and, if need be, administer it by a receiver directly amenable to its authority for the benefit of all parties interested, of whatever State they may be citizens. The request that this court will simply confirm the appointment of a receiver made in another circuit, and by its order *insist* that receiver with the possession and control of the mortgaged premises within this district—no other relief being contemplated—is, in effect, a request that this court will compel all who have claims and rights in respect to the mortgaged property situated in West Virginia to seek relief in the original suit for foreclosure pending in another State, and this notwithstanding such parties may have the right, under existing legislation, to invoke the

195 jurisdiction of this court or of some court of general jurisdiction established by this State. It might be well if Con-

gress would so enlarge or regulate the jurisdiction of the courts of the United States as to enable a circuit court in which is brought an original suit for the foreclosure of a mortgage resting upon an interstate railroad to take actual possession, by its officers, of the entire line and of all the mortgaged property, wherever situated, and administer it for the benefit of all concerned, preserving in that mode the unity of the railroad and the just rights of mortgagors, mortgagees, creditors, as well as those of the general public interested in commerce among the States. But there has been no such legislation, and we do not see our way clear to effect any such result by judicial orders merely."

The case of State *vs.* Railway Company (18 Maryland, 193) is frequently referred to as authority for the proposition that a court may exercise extraterritorial jurisdiction and appoint a receiver, and through him take possession of a continuous line of railway running into another State; but we do not understand the court to have made such a ruling. Counsel for both parties conceded the non-existence of such jurisdiction, and the opinion of the court, in which it is said that "the consideration that the authority of this court cannot extend beyond the territorial limits of the State in the exercise of its remedial power does not deter it from acting in a case within its acknowledged jurisdiction, to the verge of those limits," evidences the fact that the court was of the same opinion.

The purpose of that suit was to compel the railway compan*ies* to apply its receipts not necessary for its operation, in accordance with contract, to payment of debt to the State, and by injunction to prevent the misapplication of funds thus arising.

Admission of necessity for resort to a jurisdiction, now
196 frequently inaptly termed "ancilliary," is simply a concession that the tribunal which is in such case termed that of primary jurisdiction is destitute of power over property situated in another State, for if this be not true neither excuse nor necessity can exist for action by another court having jurisdiction in the State where the property is.

A court clothed with full power to administer property needs no aid from another, and if in the exercise of lawful power it has taken possession of property through its receiver interference with that by another court would be wrongful.

One court cannot acquire power over property not within its territorial jurisdiction through the action of another court having jurisdiction where the property is, for the jurisdiction of every court must depend on the law and cannot rest on the friendly action of another court, which is sometimes termed "comity."

The statute now in force in this State declares: "If property sought to be placed in the hands of a receiver is situated within the limits of this State, no other court than one within the limits of this State shall have power to appoint any receiver of said property." Sayles, C. S., 1740*b*.

This asserts a rule of comity which the courts of this State since its passage must observe; but it also asserts a jurisdictional rule

which, from the nature of suits in which such appointments may be made, is applicable everywhere in the absence of such a statute.

What power Congress might confer on a circuit court for a district in one State over property situated in another State is not the question involved in this case. That question is, What jurisdiction has it conferred on such courts?

The acts of Congress, on which solely depend the jurisdiction of circuit courts, clearly manifesting intention, even in actions
197 transitory in their nature, to have the rights of litigants determined, as far as may be practicable in courts of the locality in which they live, and to confer jurisdiction over actions or suits local in nature only on courts having jurisdiction in the territory in which the thing in litigation is situated, we are forced to the conclusion that the circuit court in Louisiana had not jurisdiction over property in Texas such as conferred upon it power to take possession of and administer it through a receiver or otherwise.

The second question certified is:

"If no such power existed, would the negligent act of a receiver thus appointed resulting in death while operating the road in Parker county, Texas, make the company liable?"

If the Texas & Pacific Railway Company permitted a person appointed receiver by a court having no jurisdiction over its property in this State to take possession of that property and to operate it, then such person must be deemed to have been simply its agent, and it — liable for injuries resulting while the railway was managed by him in all cases in which it would be liable had he been made its agent in the ordinary manner.

The third question is:

"Would the company be liable for such negligent act if the receiver was appointed and discharged and the property restored to it by consent and collusion, as alleged by appellees, whether the court making the appointment had or had not the requisite jurisdiction; and, if the court had jurisdiction, could that issue be made available in this suit?"

Appellees alleged that the suit in the circuit court of the United States by which the receiver was appointed was collusively brought and that the receiver was appointed by consent of all parties to it,
and that, while ostensibly acting as receiver, the person so
198 appointed was really but the agent of the railway company during the time he managed its property.

They further alleged that before the discharge of Brown as receiver the railway company bound itself by writing to assume and pay all liabilities incurred by him during the time he managed the company's property as receiver; and they further alleged that during the time he operated the railway he made permanent improvements on the road to the value of two million dollars, which were paid for out of current earnings, and that when restored to the company the enhanced value of the road resulting from improvements so made was two million dollars.

If a court appointing a receiver has jurisdiction over the property to which the receivership relates, its orders and decrees will be bind-

ing on parties to the suit and must be given effect so far as they affect the property; but it does not follow from this that the true relation of the person appointed to the railway company when property is placed in his possession may not be inquired into whenever that becomes necessary in litigation between the company and persons not parties to the suit in which the appointment is made.

If the court has jurisdiction, every reasonable presumption ought to be indulged that the relation of the receiver to the property and its owner is what that relation ordinarily is, for it ought not to be presumed or even found to be true in the absence of cogent evidence that a court has made itself the mere tool of apparently adverse litigants or that it entertained a collusive suit.

A suit is said to be collusive when brought by seemingly adverse parties under secret agreement and co-operation with view to have some legal question decided which is not involved in a real
199 controversy between them, or when so brought with intent to defraud other persons, there being no real controversy between the parties on purpose to secure some relief which as between themselves would not be conceded without suit.

The power of a court to appoint a receiver is based on the fact of real litigation between the parties, in which it becomes necessary in the opinion of the court to take possession of property to which the controversy in some manner relates in order to preserve it or, if necessary, to administer it for the benefit of all persons interested. He "is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such nature that if legal it might be taken in execution may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the court and of all the parties in interest in litigation wherein he is appointed. He is required to take possession of property as directed, because it is deemed more for the interest of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in *custodia legis*." Davis *vs.* Gray, 16 Wall., 217.

If parties having no real controversy and desiring no lawful relief which makes resort to a court necessary institute a suit and have a receiver appointed to take possession of property for the purpose of defrauding other persons or to embarrass them in assertion of right against one of the parties and its property, no principle of justice sanctions the interposition of a court or the appointment of a receiver, and it would be a perversion of justice to hold otherwise than that a receiver appointed under such circumstances is
200 the agent of the person or corporation whose property may thus collusively be placed in his possession.

The theory on which a receiver is held to be an officer of the court appointing him and not the agent of the owner, whose property is placed in his possession, is that the property to be controlled is taken from the custody and management of its owner and made subject to the control of the court without his consent, but where

the defendant owner asks the court to do this he in effect asks the court to make an appointment for him, and it is but just that a receiver so appointed should be held to be his agent.

That a plaintiff conclusively acts with a defendant for such a purpose only aggravates the case, for this enables the owner to impose upon the court, and such a plaintiff has no ground for complaint if the receiver be held the agent of the owner in reference to every act out of which in the management of the property obligation to other persons may arise. The statute of this State which declares that "no receiver shall ever be appointed of any joint stock incorporated company or of any copartnership or private person on the petition of such joint stock incorporated company, partnership, or person" is but a legislative declaration of the rule recognized by courts of equity. Robinson *vs.* Hadley, 11 Bevan, 614; Liddel's Executor *vs.* Starr, 19 N. J. Eq., 163; Mare *vs.* Littlewood, 2 M. & C., 458.

Corporations ought not to be heard to say that they are either indisposed or incompetent to manage their own affairs, and that therefore some court should take charge of them through a receiver.

If the officers of a corporation misconduct its business, stockholders usually have the power to remove them, and in cases in which they have not the ability to protect themselves courts of equity have power to control the acts of such officers or even to remove them, but such misconduct does not authorize courts
201 to appoint receivers and through them to assume the management of a business or property.

The opinion in Metz *vs.* Railroad Co. (58 N. Y., 61) states the only ground on which it can be held that receivers are not agents of the persons or corporations whose property is placed in their possession by a court of competent jurisdiction, but it recognizes the fact that the rule applies only when the appointment is not made or brought about at the desire of the owner, and assumes that the rule applies only when the appointment is made against such person's will.

We do not wish, however, *do* be understood to hold that there must be active opposition or even open dissent on the part of the owner to the appointment of a receiver in order to make operative the general rule, for if the application be justified by existing facts good faith would not require opposition; but we do wish to be understood to hold when a receiver is appointed by agreement between the parties to a suit in order to accomplish a purpose not lawful in itself that the receiver must be considered the agent of the owner of the property.

In a case in which by consent of parties a receiver was appointed with power to receive and sue for all sums due the litigants and the same to hold subject to the order of the court it was held that the person so appointed could not be considered an officer of the court, and that he must be considered the agent of the parties because the appointment was in effect the act of the parties. Keller *vs.* Williams, 3 Rob., 321.

The Texas & Pacific Company, including its main and lateral

roads, perhaps had more than one thousand miles of railway in Texas, the main line extending from its eastern to its western boundary, and it may be that it had, as is not unusual, a
202 floating indebtedness, and would in current business incur obligations along its entire line, whether operated by the company or a receiver, in payment of which current earnings ought to have been applied.

Under such circumstances, if the real purposes of the receivership *was* not the lawful purposes shown by the pleadings in the circuit court, but were to place the property of the company in the hands of a receiver subject to the control of a court sitting in another State in order that the railway company might not be subject to suits in the ordinary course of judicial proceedings; that its creditors here should be thus embarrassed in enforcement of their rights by having to resort to a court so far from the place where their causes of action arose, all for the purpose of enabling the parties to that suit, by agreement between them, to apply the earnings of the road to the betterment of the property belonging to the one and to which the other looked as a security for debt, then the receivership ought to be deemed to have been collusive and the receiver be held to have been simply the agent of the railway company.

Under such facts, which we do not assume to be true, but refer to for illustration, made known to the court, the receiver would not have been appointed, and the railway company ought not to be permitted to escape liability on the ground that through false and fraudulent pretenses made by another acting under a collusive agreement with it the court had been induced to make an appointment that would not have been made had the real purpose been disclosed.

In Sage *vs.* Railroad Co. (17 Fed. Rep., 362) a distinguished circuit judge of the United States, on discovering the existence of such a state of facts as referred to, at once took steps to close a receivership, and in disposing of the questions presented with such
203 forceful language vindicated the abused jurisdiction of the court and gave the rules applicable in such cases as to challenge the admiration of every person having due regard for the pure administration of the law.

If the appointment of the receiver was obtained through collusion of the parties to the suit in which the appointment was made, it is unimportant whether the court would have had jurisdiction in a proper case to make the appointment, for in such case the company would be as fully responsible for negligence in the operation of its road through which injury resulted to a third person as would it be if its road had been operated under the management of a superintendent appointed by its directory, and the facts which show such liability may be proved in this cause.

The fifth question certified is:

"In what, if any, state of the case as above set forth would appellees be precluded from disputing the validity of the appointment of

the receiver, the deceased fireman having contracted with him in that capacity?"

In view of the entire case stated, it is not perceived that the fact that the person acting as receiver made the employment in that character could affect the right of appellees to show what his true relation to the company was. If while he was in fact and in law the agent of the company it permitted him to assume to act as receiver and to control its property and employ persons to operate it, this would present simply the ordinary case of an agent contracting in relation to the principal's business entrusted to him without disclosing who his principal is.

It was held in Railway Co. *vs.* Culberson (72 Tex., 375) that one railway company operating the road of another under an unauthorized lease was the agent of the latter in so far as its duties to
the public were concerned, but that as to the employees of
204 the former no such agency and resulting liability existed.

The decision in that case can have no application to the question certified.

The sixth question certified is:

"In any state of case as above set forth would the statute of limitations preclude a recovery?"

It has been held by the Supreme Court of the United States and by this court that after the discharge of a receiver against whom suit has been brought, if there be facts to fix liability on a railway company's property for acts occurring during the receivership, it is proper to make the company a party and continue the litigation. Railway Co. *vs.* Cox, 145 U. S., 593; Railway Co. *vs.* Anderson, 149 U. S., 237; Brown, receiver, *vs.* Gay, 76 Tex., 444; Boggs *vs.* Brown, receiver, 82 Tex., 43; Railway Co. *vs.* Comstock, 83 Tex., 537. In Railway Company *vs.* Comstock it was held that the action did not abate on discharge of the receiver, and that, the company having been made the defendant, the action should be treated as continuous from time it was instituted against the receiver, from which it followed that limitation could not be invoked unless the action was barred when brought against the receiver.

This action, however, could not have been maintained against the receiver nor against the railway company after his discharge if his relation to the company was really only that which a receiver ordinarily sustains to the person whose property is placed in his possession and management. Turner *vs.* Cross & Eddy, rec'rs, 83 Tex., 218.

If the action had been brought against Brown as agent of the railway company it could not have been sustained, for the action so treating him ought to have been brought against his principal.

The case now stands as though no suit had been brought until
the railway company was made the defendant, and from that
205 standpoint the question of limitation must be considered.

The question of limitation is presented under the facts assumed as the basis for the preceding questions certified, and looking to them it is evident that such facts operated to conceal the fact that

cause of action existed against the company, and it could not well be held that such concealment was not fraudulent.

The rule in this State is that the fraudulent concealment of a plaintiff's cause of action takes the case out of the bar of statutes of limitation. Munson *vs.* Hollowell, 26 Tex., 475; Ripley *vs.* Withee, 27 Tex., 17; Ransome *vs.* Bearden, 50 Tex., 127; Calhoun *vs.* Burton, 64 Tex., 515; Anding *vs.* Perkins, 29 Tex., 348; Connoly *vs.* Hammond, 58 Tex., 17; Brown *vs.* Brown, 61 Tex., 45.

The limitation on this rule is that a plaintiff cannot excuse his delay in instituting suit on the ground of fraudulent concealment of his cause of action if his failure to discover is attributable to his own neglect, and whether such neglect existed in a given case must be determined from the facts of that case.

The fourth and fifth questions certified are:

"If a collusive and fraudulent receivership was shown, or, rather, if that was the proper deduction from the undisputed evidence, was the court required to submit the issue to the jury before a judgment could be entered on a general verdict finding negligence?"

"If appellant could be held liable for the death loss in question on the ground of a collusive and void receivership, as alleged, upon a verdict finding that issue in favor of appellees, should the judgment be reversed for fundamental error where the pleading and proof raised the issue and no error is assigned for failure to submit it to the jury?"

These may be considered together.

It has been held, in a long line of decisions, that a charge,
206 correct so far as it applies to the facts, but omitting to state the law applicable to an issue raised by them, furnishes no ground for reversal unless proper instruction relating to the matter omitted be asked and refused. Robinson *vs.* Varnell, 16 Tex., 387; O'Connell *vs.* The State, 18 Tex., 363; Peeler *vs.* Guilkey, 27 Tex., 358; Ford *vs.* McBridge, 45 Tex., 501; Davis *vs.* Roosvelt, 53 Tex., 316; Beazley *vs.* Denson, 40 Tex., 434; Cockrill *vs.* Cox, 65 Tex., 675; Railway Co. *vs.* Arispe, 81 Tex., 519.

Whatever exceptions there may be to this rule, none of them embrace a case in which the undisputed evidence establishes the fact to which the omission relates.

The eighth question certified is:

"As deceased was killed since the act of Congress of March 3, 1887, relating to Federal receiverships, what effect, if any, did it have on the issues involved?"

As this is now an action against the railway company, that act has no bearing on any issues raised by the pleadings; but were it an action that could have been maintained against the receiver or were it against him all the issues made in the pleadings on which that act could have any bearing were settled by the Supreme Court of the United States in the case of Railway Co. *vs.* Johnson, 14 Sup. Rep., 250, and in other cases.

STAYTON,
Chief Justice.

Opinion delivered April 30, 1894.

207 *Petition for Writ of Error.*

In the Supreme Court of Texas.

Your petitioner, The Texas & Pacific Railway Company, respectfully shows to the court that it is a railway corporation duly organized and existing under and by virtue of the laws of the United States, to wit, "An act to incorporate the Texas & Pacific Railway Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and acts amendatory thereof and supplemental thereto, including an act approved May 2, 1872, whereby, among other things, the name, style, and title of the Texas Pacific Railroad Company was changed to the Texas & Pacific Railway Company.

Your petitioner would further show to the court that on December 16, 1885, the Missouri Pacific Railway Company filed suit against the Texas & Pacific Railway Company in the U. S. cir. court for 5th circuit and eastern district of Louisiana, asking, among other things, for the appointment of a receiver of the lines and properties of the said Texas & Pacific Railway Company; that said suit was styled as follows:

"In the Circuit Court of the United States for the Eastern District of Louisiana. In Equity.

THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation Incorporated under the Laws of the State of Missouri and a Citizen of the said State of Missouri,	Of — Sessions.
vs.	No. 11181.
THE TEXAS & PACIFIC RAILWAY COMPANY, a Corporation Created by and Existing under Certain Acts of Congress of the United States.	

208 To the honorable the judges of the United States circuit court in and for the fifth circuit and eastern district of Louisiana:"

The said bill set forth in detail the fact of the incorporation of the above companies. It alleged that the Texas & Pacific Railway Company, a corporation existing under the laws of the United States of America, had properties and rights in the States of Louisiana and Texas, under and by virtue of the laws of both of said States, and had at the time citizenship and domicile, offices and places of business, in the eastern district of Louisiana and officers and agents in the city of New Orleans, on whom process could be served. It also alleged that the Texas & Pacific Railway Company was the owner of about 1,487 miles of railway, of which there was about 532 miles between Texarkana, Texas, Shreveport, La., and Fort Worth, Texas; about 619 miles between Fort Worth, Texas, and El Paso, Texas, and about 336 miles from Shreveport, La., to New Orleans, La.

It also set forth that there was a large indebtedness existing against the lines and properties of the said Texas & Pacific Railway Company, in the form of certain bonds which had been duly issued and which were secured by mortgages on the various properties of the said company, in manner and form as set forth therein, and was a lien upon same. It was also alleged that the said Texas & Pacific Railway Company was largely indebted to the said Missouri Pacific Railway Company, in a sum aggregating about two million dollars, a large amount of which was claimed to be due by note. It was further alleged that the said Texas & Pacific Railway Company had a large floating indebtedness, and was indebted to various and sundry other persons; it set forth that the said Texas &
209 Pacific Railway Company was insolvent and unable to pay said indebtedness, and judgment was prayed for in behalf of the said Missouri Pacific Railway Company for the amount of its indebtedness, and that the claims on the lines and property of the said Texas & Pacific Railway Company be determined and the priority and extent of the various liens be declared, and that said railroad and the franchises and other property to it belonging be sold for the purpose of satisfying the claims of all creditors.

Said Missouri Pacific Railway Company prayed also that a receiver be appointed to take into his possession, custody, and control all the property, rights, and franchises, money, books, accounts, lands, and premises of every kind and description of the said Texas and Pacific Railway Company or to which it has right in Louisiana and Texas and wherever situated, and to manage, operate, and maintain the lines of the said defendant company, with authority to employ such agents and servants as may be necessary to preserve the property of the said Texas & Pacific Railway Company, and keep it open as a public highway for the transportation and carriage of passengers and freight by steam power as aforesaid, and for the proper performance of and discharge of its business as a railway company.

An injunction was also prayed enjoining the said Texas & Pacific Railway Company, its agents, servants, and employés, from obstructing or in any way interfering with the said receiver.

On the filing of the said bill the honorable circuit court for the fifth circuit and eastern district of Louisiana made an order appointing John C. Brown and L. A. Sheldon receivers of the railroads of the defendant company, to wit, The Texas & Pacific
210 Railway Company, both in Louisiana and Texas, and all the property of the said company, with full power and instructions to take possession, custody, and control of same, together with all the rights, franchises, money, books, accounts, lands, and premises of every kind and description of the said company to which it had right in Louisiana and Texas and wherever situated, and were directed to operate and maintain the said lines of railway of the said company, with authority to employ such officers and agents, etc., as might be necessary to preserve and protect the property; which said order of the court was filed on the 16th day of December, 1885, and on the 8th day of January, 1886, the appointment of

said receivers was by the judge of said court, to wit, the Hon. Don A. Pardee, circuit judge, confirmed by an order and decree entered on the records of the court in said cause.

Afterwards other suits were filed in the said circuit court of the United States for the fifth circuit and eastern district of Louisiana by the Fidelity Insurance, Trust and Safe Deposit Company against the Texas & Pacific Railway Company, and by George D. Krumbhar and Samuel L. Felton, trustees, against the same company, the said parties having debts and liens against the said Texas & Pacific Railway Company, under and by virtue of the mortgages executed to secure various railway bonds issued by the said company, as set forth in the original bill filed by the Missouri Pacific Railway Company. All of these suits were consolidated and the receivership was extended to such suits.

Suits by the same parties against the same company were likewise filed in the circuit court of the United States for the fifth circuit and northern district of Texas, at Dallas, in which the appointment of the receivers made by the hon. circuit court at New Orleans was ratified and confirmed.

211 It shows that said receivers, under and by virtue of said order, did take possession of said road and all of the company's property and operated same as common carriers, under the orders of said court, from December 16, 1885, until October —, 1887, when L. A. Sheldon resigned, and the said John C. Brown, as receiver, continued to operate said road until October 31, 1888, at which date said John C. Brown, by order of the circuit court of the United States for the fifth circuit and eastern district of Louisiana and of the northern district of Texas, delivered all of the railroad, property, and effects held by him as such receiver back to the Texas & Pacific Railway Company.

For more particularity your petitioner attaches to this petition full copies of the bill in equity filed by the Missouri Pacific Railway Company against the Texas & Pacific Railway Company; the answer of the defendant, The Texas & Pacific Railway Company; the order on petition of receiver for discharge; the petition for final discharge, all of which will be marked Exhibit A, and it is asked that same be looked to and considered as a part of this petition.

212 Petitioner shows the court that the decree appointing said receivers was in words and figures as follows, to wit:

THE MISSOURI PACIFIC RAILWAY COMPANY
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 11181.

Now, on this the 16th day of December, 1885, comes on to be heard upon the bill and exhibits of the complainant and upon the answer of the defendant the application and prayer of the complainant, The Missouri Pacific Railway Company, in the above cause for the appointment of a receiver to take into possession, custody, and control all the property, rights and franchises, money, books, accounts, lands, and premises of every kind and description of the

said defendant company or to which it had right in Louisiana and Texas and wherever situated, with power as therein prayed; and thereupon appeared the complainant and the defendant, by their solicitors, and also appeared Richard C. Dale, Esq., of Philadelphia, Pennsylvania, solicitor, representing the Fidelity Insurance, Trust and Safe Deposit Company, trustees of the several mortgages in the said bill mentioned, and Walter D. Denegre and Bayne & Denegre, for certain land-grant bondholders, and others, represented by John R. Dos Passos, Esq.

And the said application having been considered by the court, it is now ordered, adjudged, and decreed as follows:

That the prayer of the said bill be granted, and that Lionel A. Sheldon and John C. Brown be, and are hereby, appointed joint receivers of all the said railroads of the defendant company, both in Louisiana and in Texas, and of all the property of said company,

213 with full power and instructions hereby to take possession, custody, and control of all the property, rights and franchises, money, books, accounts, lands, and premises of every kind and description of the said defendant company or to which it has right in Louisiana and Texas and wherever situated, and to manage, operate, and maintain the said lines of railroad of the said defendant company, with authority to employ such officers, agents and employés, and counsel as may be necessary to preserve and protect all the property of the defendant company and keep it open as a public highway for the transportation or carriage of passengers and freight by steam power as aforesaid and for the proper performance of its business as a railway company and a common carrier, and to collect as far as possible all accounts, choses in action, and credits due to said company, acting in all things under the order of this court or of such other courts as may entertain jurisdiction of parts of such property as ancillary to the jurisdiction of this court in this cause, the said receivers being appointed subject to the right of all parties in interest to suggest other appointees or to show cause or make objection to the same before me on the 9th day of January, 1886, and to the orders which may then be made in the premises.

It is further ordered that the said receivers, out of the income that shall come into their hands from the operation of said railroad or otherwise, proceed to pay all balances due or to become due to other railroads or transportation companies on balances growing out of the exchange of traffic accruing during six months prior thereto.

That said receivers also pay in like manner out of any incomes

214 or other available revenue which may come into their hands all just claims and accounts for labor, supplies, professional services, salaries of officers and employés that had been earned or have matured within six months before the making of this order; also all taxes, State, county, or municipal, that may be or may become due on any of the property of said company; also the interest on the debt due the State of Texas as the same may become due.

It is further ordered that all parties, upon being informed of this

order, proceed to surrender all the lines of said railroad and all the property, choses in action, and accounts of said company to said receivers, who jointly and severally are authorized and directed to take possession of the same at once, and the complainant is authorized to apply to any other United States circuit court of competent jurisdiction for such order or orders in aid of the primary jurisdiction vested in this court in said cause as may have ancillary jurisdiction herein.

And it is further ordered that said receivers pay all current expenses in the operation of said road, including just and proper claims for loss or damage to freight and baggage, and shall collect all the revenues thereof and all choses in action, account-, and credits due or to become due to the company.

That such receivers keep such accounts as may be necessary to show the source from which all such income and revenues shall be derived, with reference to the interest of all parties herein, and the expenditure by them made.

And it is further ordered that said receivers report to this court from time to time their doings under this decree, and that they apply for instructions to this court when necessary.

(Signed) DON A. PARDEE,
Circuit Judge.

(Filed December 16th, 1885.)

215 The decree confirming the appointment of said receivers was as follows:

THE MISSOURI PACIFIC RAILWAY COMPANY }
vs. } No. 11181.
THE TEXAS & PACIFIC RAILWAY COMPANY. }

This court having on the 16th day of December, 1885, appointed Lionel A. Sheldon and John C. Brown receivers in this cause, subject to the right of all parties in interest to suggest other appointees or to show cause or to make objection to the same on this day;

And the matter coming on to be heard upon said reservation, and after hearing John R. Dos Passos, Esq., of counsel for various bondholders for the trustees represented by him, and Samuel Dickson, Esq., for the trustees represented by him, and there being no objection thereto presented to the court:

It is ordered that the said receivers, Lionel A. Sheldon and John C. Brown, be, and they are hereby, confirmed in their appointment and continued as such, and that they give bond within ten days in the sum of fifty thousand dollars each, with good and solvent surety, to be approved by the judge of this court or by a special master in this cause.

It is further ordered that said receivers pass their accounts monthly before a special master to be appointed by the court in this cause.

DON A. PARDEE, *Judge.*

(Entered and filed January 9, 1886.)

216 Your petitioner would further show to the court that while the said John C. Brown was operating the line of the Texas & Pacific Railway Company as receiver, under and by virtue of the appointment made by the honorable court as aforesaid, on, to wit, the 23rd day of January, 1888, one John M. Gay, who was in the employ of such receiver as a fireman on one of the engines then being run and operated over and on the lines of said Texas & Pacific Railway Company, was killed in the State of Texas. On the 6th of February, 1888, Nancy J. Gay, his wife, for herself and in behalf of Bessie Gay, her daughter, filed suit in the district court of Tarrant county, Texas, against said John C. Brown, receiver of the Texas & Pacific Railway Company, to recover damages for said killing, it being claimed that said John C. Brown, receiver, was guilty of negligence in respect to the said accident, in that it was claimed said engine was defective and not furnished with certain and proper fastenings so as to securely hold the engine to the tender of same, whereby the same became separated while in motion and allowed the said John M. Gay to fall between same and become run over and killed. On the 28th day of February, 1889, she recovered judgment against the said John C. Brown, receiver; which judgment, upon appeal to the supreme court of the State of Texas, was on the 11th day of November, 1889, reversed. Afterwards, on the 24th day of April, 1890, the said Nancy J. Gay, by amended pleading, dismissed suit as to the said John C. Brown, receiver, and sought to recover against the Texas & Pacific R'y Co. and asked judgment against it on account of the negligence of the said

217 John C. Brown, receiver, and alleged that the said Texas & Pacific Railway Company was liable for all the debts and liabilities which may have accrued against the said John C. Brown, receiver.

Your petitioner further shows to the court that the said Nancy J. Gay, in her said suit in the district court of Tarrant county, Texas, in the second amended supplemental petition by her filed, and which was one of the pleadings in force and effect at the time of the trial thereof, alleged, among other things, that the said Texas & Pacific Railway Company, on the 15th of December, 1885 (at the time the appointment of said receivers was had), was, and for a long time prior thereto had been, the owner of a certain line of railroad extending through and into various counties in the States of Texas and Louisiana. She also showed the fact of the consolidation of the various suits brought by the said Missouri Pacific Railway Company and the mortgage bondholders against the Texas & Pacific Railway Company.

Said defendant company answered, and by general demurrer said that plaintiff showed no cause of action against it, and also plead a general denial to the claim of liability against it, as well as other and further pleas which need not be here mentioned. Said general demurrer was overruled by the court and was by it held not to be well taken. There was a trial and judgment for plaintiff, on the 21st day of December, 1890, against the said Texas & Pacific Railway Company in favor of the parties plaintiff. Your petitioner

appealed said case, and on the 11th day of October, 1893, the cause came on to be heard before the court of civil appeals for the second supreme judicial district of Texas, and, upon motion of appel-
218 lant, the cause was reversed for the reason that it appeared that the alleged cause of action for the death of said John M. Gay happened during the receivership, and under the laws of the State of Texas then in force no right of action survived to his wife and child. Afterwards a rehearing was granted by said court, and, on the 20th of June, 1894, the said court of civil appeals affirmed the judgment of the district court. Your petitioner then prayed for and obtained a writ of error to the supreme court of the State of Texas, and the cause was heard in said court, and on the 18th day of March, 1895, the said court rendered its judgment, affirming the decree and judgment of the said court of civil appeals and that of the district court. Your petitioner, within the proper time, filed motion for rehearing, which was, on the 18th day of April, 1895, overruled.

Your petitioner shows the court that it claimed as a defence to said suit against it the right, privilege, and immunity from any suit in the district court of Tarrant county, Texas, where this suit was filed, on the cause of action which was alleged to have arisen by the death of the said John M. Gay while in the employ of said John C. Brown, receiver, and claimed that under the order of the circuit court of the United States above set forth the Texas & Pacific R'y Co. could not be sued or held liable in the said district court of Tarrant county on the cause of action alleged to have arisen against said receiver while he was operating the road; and defendant specially plead and relied upon, as a defence to said suit, the order of the said circuit court, above set out, which appointed said John C. Brown receiver of all the lines and property of the Texas & Pacific Railway Company, and enjoined the said named company from in any way interfering with said receiver and com-
219 manding it to deliver all of its lines and property to the said John C. Brown, to be by him operated as receiver under and by virtue of the order of said court.

Your petitioner would further show to the court that the decision of the district court of Tarrant county, Texas, made on the trial of said cause on the date aforesaid, was against said claim, right, privilege, and immunity so specially set up, and judgment was then and there rendered in favor of the said Nancy J. Gay and Bessie Gay and against the Texas and Pacific Railway Company in the sum of $7,500, from which said judgment the Texas and Pacific Railway Company prosecuted its appeal, as hereinbefore alleged, to the court of civil appeals of the State of Texas, the judgment of which said court was also against said claim, right, privilege, and immunity so specially set up, and the Texas and Pacific Railway Company duly and regularly prosecuted its writ of error from the said court of civil appeals to the supreme court of the State of Texas, and that said claim, right, privilege, and immunity so specially set up as aforesaid was relied upon and presented for the decision of the supreme court of the State of Texas, and the decision of said question was necessary to the determination of the cause, and that

said question was actually decided by the said supreme court of the State of Texas, said court rendering a final judgment adverse to and against the said claim, right, privilege, and immunity so specially set up by the said The Texas and Pacific Railway Company, the judgment of the supreme court being an affirmance of the judgment of the court below, and that said judgment could not have been rendered or given without deciding and passing upon said claim, right, privilege, and immunity so specially set up; that said supreme court of the State of Texas is the highest court of the State of Texas in which a decision in the above suit can be had.

220 Premises considered, your petitioner, The Texas & Pacific Railway Company, prays for writ of error to remove this cause to the Supreme Court of the United States, to be there reexamined by said court and said judgment reversed.

It further prays for writ of supersedeas, to the end that the execution on said judgment may be suspended pending the hearing of said writ of error, and that the amount of the bond therefor be fixed, and it prays that citation be issued to said Nancy J. Gay and Bessie Gay, or their attorneys, to appear before the Supreme Court of the United States in accordance with the law and the rules of the court in such cases made and provided.

T. J. FREEMAN AND
GEO. THOMPSON,
Attorneys for Texas & Pacific Railway Company.

Writ of error and supersedeas allowed this 14 day of June, 1895, and bond fixed in the sum of $15,000.

R. R. GAINES,
Chief Justice of the Supreme Court of the State of Texas.

221 UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

THE MISSOURI PACIFIC RAILWAY COMPANY
versus
THE TEXAS AND PACIFIC RAILWAY COMPANY. } No. 1-181.

W. P. Ballinger, for the complainant.
Baker, Botts & Baker, solicitors for the defendant.
W. W. Howe, for the defendant.

222 In the Circuit Court of the United States for the Eastern District of Louisiana. In Equity.

THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation Incorporated under the Laws of the State of Missouri and a Citizen of said State of Missouri,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, a Corporation Created by and Existing under Certain Acts of Congress of the United States. } Of — Sessions. No. 11181.

To the honorable the judges of the United States circuit court in and for the fifth circuit and eastern district of Louisiana:

The Missouri Pacific Railway Company, a body corporate under the laws of the State of Missouri and a citizen and resident of said State, in its behalf, as well as of all other corporations and persons similarly situated that may, by intervention, bring themselves into this suit for the protection of their interests, brings into this honorable court its bill of complaint against the Texas & Pacific Railway Company, a corporation existing under the laws of the United States of America and having properties and rights in the States of Louisiana and Texas, under and by virtue of the laws of both of said States, and having at the same time citizenship and domicile, offices and places of business, in this district and officers and
223 agents herein, in the city of New Orleans, on whom process may be served.

And thereupon your orator complains and says:

1. That the Congress of the United States of America, by an act approved March the 3rd, 1871, created a corporation under the name and style of the Texas Pacific Railroad Company, and by an act approved the 2nd day of May, 1872, supplementary to said original act, changed the style and title of the said The Texas Pacific Railroad Company to "The Texas & Pacific Railway Company," and by said acts the Texas and Pacific Railway Company was authorized and empowered to construct a line of railway from a point at or near the eastern boundary line of the State of Texas, near the town of Marshall, in Harrison county, westward to the western boundary line of the State of Texas, to a point at or near a point

opposite to El Paso, in the Republic of Mexico, and thence westward, as set forth in said act, to the Pacific ocean, at San Diego, and by the fourth section of said original act the said Texas & Pacific Railway Company was authorized to purchase the stocks, land grants, franchises, and appurtenances of and consolidate on such terms as might be agreed upon between the parties with any railroad company or companies heretofore chartered by congressional, State, or territorial authority on the route prescribed in the first section of the act, etc., and is also authorized to own, maintain, and operate a railroad to Shreveport, Louisiana.

2. That the legislature of the State of Texas, by an act passed May the 24th, 1871, entitled "An act to encourage the speedy construction of a railway through the State of Texas to the Pacific ocean," by its eleventh section authorized the consolidation with the said Texas and Pacific Railway Company of the Southern
224 Pacific Railroad Company and the Southern Trans-Continental Railway Company, two corporations before that time organized under the laws of the State of Texas, the first of which was authorized to construct a line from the eastern boundary line of the State of Texas, at or near Marshall, westward to El Paso, on the Rio Grande, and the last-named corporation was authorized to construct a line from Marshall, in said State, northwardly to Texarkana and westwardly by Clarksville, Paris, and other points to El Paso; and said act of May the 24th, 1871, authorized the Texas and Pacific Railway Company to consolidate with said two corporations on such lawful terms and conditions as might be agreed upon b-tween the said companies, and should be ratified by a majority of the stockholders of each of the corporations so consolidating.

3. That by an act of the Texas legislature passed November 25th, 1871, entitled "An act amendatory of and supplementary to an act entitled 'An act to encourage the speedy construction of a railway through the State of Texas to the Pacific ocean,' passed on the 24th day of May, 1871," said act of the 24th day of May, 1871, was so amended as to require a junction of the said Southern Pacific Railroad Company and said Southern Trans-Continental Railway Company at a point westwardly to be agreed upon by said companies, which act was complied with by said two last-named companies by an agreement in writing filed in the office of the secretary of state of the State of Texas and dated the 6th day of May, 1872, fixing the point of junction at or near the city of Fort Worth, in the county of Tarrant, in said State of Texas.

4. That on the 21st day of March, 1872, the said Texas and Pacific Railway Company and the said Southern Pacific Rail-
225 road Company executed and filed with the secretary of state articles of consolidation, in pursuance of the legislation aforesaid, and on the 30th day of March, 1872, articles of consolidation were made, executed, and filed in the office of the secretary of state of the State of Texas between the Southern Trans-Continental Railway Company and the Texas & Pacific Railway Company, in pursuance of the legislation aforesaid, by which said consolidations the said The Texas and Pacific Railway Company be-

came entitled to and vested with the rights, franchises, property, and privileges of both the Southern Pacific Railroad Company of Texas and the Southern Trans-Continental Railway Company of Texas, as aforesaid, and was also invested with all the rights and privileges of the Southern Pacific Railroad Company of Texas in and to a certain lease before that time made and entered into by and between the said Southern Pacific Railroad Company of Texas and the Vicksburg, Shreveport and Texas Railroad Company, existing under the laws of the State of Louisiana in and to that portion of the line of said last-named company extending from Red river at Shreveport westwardly to the Texas State line, by which said lease the said Southern Pacific Railroad Company had the right to use and operate, for its own exclusive use, the lines so leased from and until the month of February, in the year 1884, at which said latter date, or soon thereafter, the said The Texas and Pacific Railway Company renewed said lease, with certain modifications therein contained, under and by virtue of which renewal the said The Texas and Pacific Railway Company has the right to continue to operate and maintain that portion of said leased line between the eastern boundary line of the State of Texas and
226 its junction with the road of the New Orleans Pacific Railway Company, near the western boundary line of the city of Shreveport, on the terms and conditions therein stated, and with certain other rights and privileges therein contained, which will more fully appear by reference to the copy of the lease itself, which will be filed in this cause.

5. That by an act of the legislature of Texas on the 22nd day of May, 1873, entitled "An act to adjust and define the rights of the Texas & Pacific Railway Company within the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific ocean," the consolidations aforesaid were fully recognized and ratified by the legislature of Texas, and the manner and mode of the construction of its line and railway were fully defined, and by said act there *was* donated by the State of Texas to the said Texas & Pacific Railway Company twenty sections of land, of six hundred and forty acres each, for every mile of its road completed in good, substantial running order in the State of Texas, upon the terms and conditions prescribed in said act, and it defined the limits within which the lands aforesaid should be located, as the construction progressed, in sections of twenty or more miles.

6. That among other supplementary and amended acts passed by Congress the one approved June the 22nd, 1874, recognized and ratified the consolidations of the Southern Pacific Railroad Company of Texas and the Southern Trans-Continental Railway Company of Texas with the said Texas and Pacific Railway Company, and provided that the road so merged, for the purposes of the mortgages therein authorized, as well as for all other purposes, be deemed and taken to be a part of the said Texas & Pacific railway
227 and subject to all provisions and limitations of the act of Congress incorporating said company and of the supplements thereto.

7. The said Texas & Pacific Railway Company organized under the act of Congress aforesaid and accepted the provisions of the various acts above recited of the State of Texas and completed its line from the eastern boundary line of the State of Texas, near the city of Marshall, westwardly to a point about eighty-one miles east of El Paso, and it reaches El Paso by a joint agreement by the Galveston, Harrisburg and San Antonio railway (known generally as the Southern Pacific railway) over its line into El Paso. It also completed its line from Marshall by way of Jefferson to Texarkana and from Texarkana westwardly by way of Clarksville, Paris, Bonham, Sherman, and Pilot Point to a junction with its southern line at Fort Worth, and received from the State of Texas from time to time about five million acres of land for the construction of its line east of Fort Worth.

8. That by deed dated the 20th day of June, 1881, by and between the New Orleans Pacific Railway Company, party of the first part, and the Texas and Pacific Railway Company, party of the second part, which deed is hereby referred to as a part hereof of this bill, the Texas & Pacific Railway Company, by virtue of the franchises obtained by its various charters from the Government of the United States and acquired by the legislation of the State of Texas, and by virtue of the authority conferred by the laws of the State of Louisiana, acquired by and under said name the railway and all of the franchises and rights and appurtenances
228 thereto of the New Orleans Pacific Railway Company, a line constructed and being operated between the city of Shreveport, in Caddo parish, Louisiana, and the city of New Orleans, including a branch extending to West Baton Rouge, on the Mississippi river; which lines were encumbered prior to the said purchase and acquisition by a mortgage executed by said New Orleans Pacific Railway Company to the Fidelity Insurance, Trust and Safe Deposit Company of the City of Philadelphia to secure an issue of six per cent. bonds, interest payable semi-annually, at the rate of $20,000 per mile, limited to an aggregate issue of $7,000,000, of which $6,720,000 are now outstanding. Said mortgage was duly made July 31, 1880, and a mortgage supplemental thereto was made July 1, 1884, and both duly recorded in the parishes through which the said line passes in Louisiana.

9. That on the 15th day of May, 1875, the said Texas & Pacific Railway Company made and executed a first mortgage upon the lines of the Eastern division, being all the lines of said company between Fort Worth and the Louisiana State line, to secure an issue of $8,000 per mile of gold bonds due and payable on the first day of March, 1905, bearing interest at the rate of six per cent. per annum and payable semi-annually (said issue being limited to 4,193 bonds) on the first day of March and September, and the coupons have been regularly paid up to this time. The original trustees under said mortgage were Matthew Baird and Samuel M. Felton. On the death of Matthew Baird, George D. Krumbhaar was appointed his successor, and the present trustees both reside in the city of Philadelphia, State of Pennsylvania.

10. That on the first day of June, 1875, said Texas & Pacific Railway Company executed a mortgage upon the property last before mentioned to secure an authorized issuance of bonds
229 aggregating $13,100,000, due the 1st day of June, 1905, and bearing interest at the rate of six per cent. per annum by coupons due and payable in June and December of each year, all of which are now either outstanding or bearing interest in favor of the sinking fund. The trustees named in said mortgage were Matthew Baird and Samuel L. Felton. Said Matthew Baird having died, George D. Krumbhaar was appointed as his successor and is now acting as such in conjunction with the said Samuel M. Felton, both of whom reside in the city of Philadelphia, State of Pennsylvania. The two mortgages last above named also embrace and include by their express terms the leasehold line between the Texas State line and Shreveport.

11. Said railway company on the 15th day of May, 1875, made and executed its income and land-grant mortgage upon all the lands granted by the State of Texas for the construction of that portion of the line, called the Eastern division, lying east of Fort Worth and west of the State line between Texas and La., being an aggregate authorized issue of 8,908,000 in bonds bearing interest at the rate of 7% per annum, payable annually in July of each year in currency or script, with William T. Walters and George D. Krumbhaar as trustees, both of whom have since resigned, and Charles E. Satterlee and George Gould were appointed and are now acting as trustees in their stead, both of whom reside in the city and State of New York; and on the 23rd day of March, 1876, said company executed a supplementary mortgage to said income and land-grant mortgage creating a lien upon its railway and the income and profits thereof east of Fort Worth and west of the Texas State line, as well as the net income of Shreveport leased line, sub-
230 ordinate to the first and consolidated mortgage above mentioned, of which said supplementary mortgage the said George Gould and Charles E. Satterlee are now the trustees. Of the bonds authorized and issued under said original and supplementary mortgage about eight millions are now outstanding, with a large amount of interest scrip in lieu of interest accrued and not earned by the railway company, and consequently not payable in money by the terms of the mortgage.

12. That the said railway company, on the 30th day of January, 1880, desiring to extend its lines westward from Fort Worth, made and executed its mortgage upon its lines west of Fort Worth, called the Rio Grande division, to El Paso, not then encumbered by any lien, to secure an authorized issue of $15,400,000 gold bonds, bearing interest at the rate of six per cent. per annum, interest payable in February and August of each year, to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, of which bonds there are now outstanding $13,028,000.

13. That on the first day of August, 1884, said railway company executed a general and terminal mortgage upon its terminal and other properties at New Orleans and elsewhere, including the Gordon

coal mines and lands and tracts — supposed to be covered by any other mortgage, said mortgage covering the entire property of said defendant company from New Orleans to El Paso, to secure an authorized issue of $6,500,000 of bonds, called terminal bonds, due on the first day of October, 1905, bearing interest at the rate of six per cent. per annum, due and payable on the first days of April and October in each year, and of which authorized issue there are now outstanding or held as collateral for the payment of other
231 debts bonds amounting to nearly, if not quite, three millions of dollars.

14. In addition to the indebtedness above named the said railway company is indebted to the State of Texas on account of a special fund loan to its predecessor, the Southern Pacific Railroad Company, about $167,642, bearing interest at the rate of six per cent. per annum in currency, the interest and sinking fund payable in May and November of each year, and which said amount is a statutory lien upon said property, formerly owned by the Southern Pacific Railroad Company, and of a dignity anterior to any of the mortgages aforesaid upon the part of the property of the said Texas & Pacific Railway Company.

15. That the defendant, The Texas and Pacific Railway Company, is now the owner of about one thousand four hundred and eighty-seven miles of completed road, of which there is in the Eastern division, between Texarkana, Shreveport, and Fort Worth, five hundred and thirty-two miles; in the Rio Grande division, between Fort Worth and El Paso, six hundred and nineteen miles, and in the New Orleans division, between Shreveport and Goulsboro and New Orleans, three hundred and thirty-six miles; that the funded indebtedness of the said company under the several mortgages hereinbefore referred to is as follows:

Bonds issued under the first mortgage of June 1st, 1875, and a charge upon the Eastern division, $3,784,000, exclusive of the balance of the issue now held by the sinking fund.

Bonds under the consolidated mortgage of June 1st, 1875, a second charge upon the Eastern division, $9,316,000.

Income and land-grant bonds, a third charge upon the Eastern division and a first charge upon the land grant of the company, about $8,300,000.

232 Bonds issued under the mortgage of January 20, 1880, and a first charge upon the Rio Grande division, $13,028,000.

Bonds issued under the mortgage of July 31st, 1880, and a first charge upon the New Orleans division, $6,720,000.

Bonds under the mortgage of August 1st, 1884, and a first lien upon certain terminal properties and a general lien upon all the property subject to prior mortgages issued and outstanding as collateral, about $2,624,000.

That your orator, The Missouri Pacific Railway Company, is the owner in its own right of nine hundred and ninety-five miles of railroad, mostly located in the State of Missouri and extending westwardly and northwestwardly from the city of St. Louis to Kansas City and Omaha; that in addition to the lines of road owned by it

in its own right your orator is the lessee or by ownership of stock or traffic arrangements controls or operates thirty-five hundred and sixty-five miles of road belonging to other companies, exclusive of the lines of defendant company, which will be hereafter referred to. In said forty-five hundred and fifty-nine miles are included the lines of the St. Louis, Iron Mountain and Southern Railway Company and its branches, extending from St. Louis southwardly to Texarkana and other towns in Arkansas, in all *the* nine hundred and twenty-three miles; the lines of the Missouri, Kansas and Texas Railway Company, extending southwardly from Kansas City through Kansas, the Indian Territory, and Texas, in all thirteen hundred and eighty-six miles; the lines of the International and Great Northern Railroad Company and its branches, extending from Laredo, on the Rio Grande, northeastwardly through Texas, in all eight hundred and twenty-five miles; the Central branch of the Union Pacific railway, in the State of
233 Kansas, in all three hundred and eighty-three miles; since 1881 the Texas and Pacific Railway Company, by an arrangement made between it and the Missouri Pacific Railway Company, by which the lines of the Texas and Pacific Railway Company were to be and in fact have been operated in conjunction with the Missouri Pacific and its leased and operated lines under the belief that such operation would be to the mutual benefit of both companies, and that if any deficit should occur in the operation of the Texas & Pacific line the complainant, The Missouri Pacific Railway Company, would advance the same on the faith of the earnings of the Texas & Pacific Railway Company, to be repair out of such current earnings, but said earnings proved wholly insufficient for the purpose, and up to September 30, 1885, the date of the last account stated between the two companies, your orator had advanced in the payment of operating expenses and interest on account of the Texas & Pacific Railway Company the sum of $–,688,015.79, of which the sum of $1,130,783.60 is represented by four promissory notes bearing date the first of December, 1884, payable on demand, and the balance of $557,143.19 is the balance stated in account current of September 30th, 1885, since which time said indebtedness has still further increased to the date of filing hereof.

16. The detail provisions of all said mortgages will fully appear by reference to copies of said mortgages herewith exhibited and made a part of this bill of complaint and marked Complainant's Exhibits Nos. 1, 2, 3, 4, 5, and 6 respectively.

17. Your orator further says that all the rolling stock, equipment, and appurtenances of every kind and character owned by the said defendant company are covered by the said mortgages herein
234 set forth and made exhibits hereto; all of which locomotives and cars for a part of the general equipment of said railway company, which said railway company is in fact and under the laws of the State of Texas and its charter by the laws of the United States one single and indivisable railroad, except in so far as the mortgage existing upon the property of the New Orleans Pacific Railway Company may be a lien upon the equipment that belonged

to and constituted a part of that line of railway before its purchase by the Texas & Pacific Railway Company.

18. Besides the large indebtedness of said railway company secured by mortgages as aforesaid, it owes a large floating debt to the complainant, some of which are debts created and incurred for labor, material, repairs, and operating and managing expenses necessary for the conduct of its business, exceeding one million and a half of dollars.

19. Your orator, further complaining, avers that for several years past said company's expenses have been so large that its surplus has been insufficient to pay the current interest on the mortgage bonds aforesaid as it matured, and that the necessary maintenance and repairs of its property have been neglected in the false policy of abortive efforts to pay the interest upon its bonded debt as it matured, and while its current interest amounts annually to nearly $1,900,000, exclusive of the income and land-grant bonds, its net receipts will not, for the current year last past nor for the present year, equal one million dollars per annum, so that a default without borrowing money for the purpose of paying maturing interest is inevitable.

20. Your orator, further complaining, says that it is a
235 creditor of the defendant company for large sums of money from time to time advanced and up to the present time continually at defendant's request and for the purpose of protecting it against defaults at various times for proper equipment and improvements that were necessary to be made in order to operate the road, as well as for necessary supplies, monthly payment for labor and current repairs, without which the defendant railway company could not have maintained its property in a condition for its operation, and, besides this, has advanced money from time to time to pay the current interest which the said defendant company was unable to meet in consequence of a deficiency in its earnings. Said sum so advanced will amount to $1,500,000. The defendant company requested these advances and loans from time to time, and they were made by your orator on the promise of the said defendant company and reliance by your orator to pay the same out of its current earnings, and the same were made in protection of the corpus of the property and in the interest of the holders of the various securities of said company and on the faith and promise of said current earnings; and your orator further avers that the same was in equity and good conscience and is a charge alike upon the income and property of said railway company; but the said defendant company has neglected and fails to pay said balance or any part thereof, but instead of so doing has been applying its earnings to the payment of large amounts of interest falling due from time to time in the vain effort to avert a default in the payment of its interest. The only security your orator has for the payment of these advances in addition to its said equitable lien thereupon is as collateral of $2,000,000 of the bonds
236 of said defendant company known as the terminal bonds and more particularly referred to in paragraph 13 of the

bill, which bonds are secured by a general mortgage covering the entire property of said company, and your orator is thereby a lien bondholder on the said entire property and premises of said defendant company, and that without such relief as herein sought said bonds will be greatly depreciated in value and no adequate remedy for the protection, security, and payment of the same; that the trustee in the mortgage securing said bonds is the Fidelity Insurance, Trust and Safe Deposit Company, a citizen of the State of Pennsylvania, which is out of the jurisdiction of this court, but it will be made defendant to this bill if it appears within this jurisdiction or as soon as the same can be done under the practice of the court.

And your orator further avers that the defendant company has no property known to your orator upon which it could levy an execution even if it should recover judgment except the property aforesaid, which is subject to mortgages in amount as much or more than the present value of the property.

21. Your orator further avers that the railway of said defendant company is in bad condition and needs a large amount of steel rails to replace iron rails already worn out and needs an expenditure of large sums of money to replace bridges which have for a long time been used and which are of wood and most of which rest upon wooden substructures. In fact, from the best estimates that your orator has been able to have made by engineers and other experts, the road-bed of said railway of the defendant company can-
237 not be put in first-class condition without the expenditure of such sums as will still further disable it from paying its fixed charges, and with its property mortgaged as it is up to, if not exceeding, its full value it is wholly impracticable to incumber it with any further liens, as the security thus issued must be sold at ruinous discount to realize cash.

22. Your orator believes, and so avers, that the railway lines aforesaid of the defendant company, if put in first-class condition, would without doubt have an earning capacity and a traffic that would enable said company to pay off its entire floating indebtedness, and at the same time meet the fixed charge created by its mortgages without difficulty, but that it is essential to reach this result that the whole of its property should remain intact and not be segregated, but that if the three separate divisions of this property should be foreclosed under the divisional mortgages resting upon each, which your orator believes and fears will be done, that its value would be so impaired as to cut off entirely the possibility of the payment of the floating indebtedness now existing or any part thereof, but that if said railway shall be administered under the orders of the court as a whole and placed in good condition it might be saved from foreclosure entirely and satisfy the equitable indebtedness thereon to your orator and all others. But if this desirable result should not be realized, yet it is almost certain that after the property shall be improved, as herein suggested, and then sold as an entirety and under proper proceedings your orator believes that the proceeds of the sale would be ample to discharge all in-

cumbrances created by said lien and the whole of the floating indebtedness of said company, but that to reach this result it
238 is essential that said railway be retained in a condition of unimpaired efficiency by the expenditure of a necessary portion or the whole of its revenue to improve its road-bed and maintain its equipment.

23. Your orator further avers that the whole of the floating indebtedness before mentioned has been incurred within the last few years, and much of it during the current year and up to the present time, and that a very considerable portion of it was for new rails and ties to maintain the road in running order, and a portion, as before stated, was advanced to pay current interest and other portions to pay current wages of employés of the company.

24. Your orator believes, and indeed has no doubt, that unless restrained by the interposition of this honorable court the current earnings of the railway company and all of its available valuable resources will be appropriated by its officers to pay current interest on its mortgage bonds in order to prevent the trustees of the various mortgage bonds from entering upon and taking possession of the properties, and your honors can readily see from an inspection of the mortgages aforesaid that if said property is taken possession of by the various trustees in the divisional mortgages it will be segregated into three several parts, although the property of the same corporation.

25. Your orator further avers that it is remediless under existing conditions for the collection of what is due it except through the interposition of this honorable court in its power to appoint a receive of the whole property aforesaid, which said receiver shall be authorized to administer said property under the orders of the court so as to insure the safety and utmost efficiency in the earning
239 capacity of said lines by an application of the current earnings thereto, and to apply, under the orders of the court, the balance that may remain to the payment of your orator's debt and such other claims as may be similarly situated or so much thereof as to the court may seem equitable, and that the said receiver have under his administration the whole of said line and maintain it in good condition and until such time as the rights of all parties can be heard and determined and the property placed upon a basis of meeting all the just and equitable demands against said company.

26. Your orator avers that it is not only the interest of this complainant, but of all other creditors of like grade, as well as a matter of vital interest to all of the lien creditors of defendant company, that a receiver shall be appointed for the purpose of administering said property as an entirety and not permit the same to go into the hands of the trustees of the divisional mortgages, and thus segregate the entire property of the said company; and your orator is advised, and therefore avers, that the trustees of a majority of the mortgages upon the lines of the defendant company acquiesce in the appointment of such receiver, believing that the same will be to their common advantage and benefit, but that unless such appointment is made said trustees will respectively proceed to take

active steps for the assertion of their legal rites to possession of the separate parts of said road or to foreclosure immediately on default in the interest on their bonds, which default will certainly take place at the approaching maturing thereof.

Wherefore your orator, showing that it is a creditor of the Texas & Pacific Railway Company to the amount of $1,688,015.79,
240 and additional sums to date not yet definitely ascertained, and that the same is an equitable lien on all the earnings of said company and all its property and is secured by the said $2,000,000 issued under the said general and terminal mortgage, and that the said Texas and Pacific Railway Company is an insolvent corporation, owning 1,487 miles of road, with mortgages thereupon to the amount of $43,340,000, the interest whereupon it is unable to meet; that the line of road is out of repair and in so dangerous a condition that the said company cannot perform its duties as carrier with safety, expedition, and convenience to the public; that judgments have been obtained against said corporation under which the assets are liable to levy and sale; and whereas your orator has no adequate remedy at law, comes to your honorable court and prays that your — have leave to make all of said trustees in the several mortgages hereinbefore named defendants hereto on their coming into the jurisdiction of this court or in accordance with the practice and equity of said court, and that they have leave to become parties hereto in assertion of their rights and interests, and that all persons holding claims of like character with your orator may appear herein for their interests, and on the hearing of this cause for equitable relief as follows:

First. That your orator be found to be a creditor of the Texas & Pacific Railway Company, and the amount of the indebtedness to your orator be fixed and determined and its lien upon the earnings and the property of the Texas & Pacific Railway Company be declared.

Second. That the amount of all claims upon the lines and other property of the Texas & Pacific Railway Company be de-
241 termined and the priority and extent of their liens be declared.

Third. That your honorable court, by a master commissioner or such other officer as to you may seem proper, shall cause to be sold the railroad, franchises, and other property of the Texas & Pacific Railway Company for the purpose of satisfying the claim of your orator and the other creditors of the company as their interest may appear.

Fourth. That a receiver be appointed to take into his possession, custody, and control all the property, rights, and franchises, money, books, accounts, lands, and premises of every kind and description of the said defendant company or to which it has right in Louisiana and Texas, and wherever situated, and to manage, operate, and maintain the lines of the said defendant company, with authority to employ such agents and servants as may be necessary to preserve the property of the defendant company and keep it open as a public highway for the transportation and carriage of passengers

and freight by steam power, as aforesaid, and for the proper performance of and discharge of its business as a railway company.

Fifth. That an injunction issue, temporary until hearing, and perpetual thereafter, enjoining and restraining the Texas & Pacific Railway Company, its agents, servants, and employés, and all persons or corporations in any manner claiming under or through the said Texas and Pacific Railway Company from obstructing or in anywise interfering with the receiver appointed by your honorable court in possession of the railroad and property of said company.

Sixth. General and other relief as may be appropriate in the premises.

242 May it please your honors to grant to your orator the writ of subpœna to be directed to the said defendant, The Texas & Pacific Railway Company, thereby commanding it, at a certain day and under a certain pain therein to be mentioned, personally to be and appear before your honorable court, and *there* and there full, true, direct, and perfect answer make to all and singular the premises, oath thereto being waived, and, further, to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall deem meet.

And your orator will ever pray, etc.

W. P. BALLINGER,
Solicitor and of Counsel for the Missouri Pacific Railway Company.

EASTERN DISTRICT OF LOUISIANA, }
City of New Orleans. }

I, William W. Finley, on oath state that I am the agent of the complainant, The Missouri Pacific railway, in the preceding bill; that I have heard the said bill read and know the contents thereof, and that on my best knowledge, information, and belief the allegations therein contained are correct and true, and that I am authorized to make this affidavit.

(Signed) W. W. FINLEY.

Sworn to and subscribed before me this 15th Dec., 1885.

[SEAL.] T. McC. HYMAN,
Deputy Clerk.

Filed December 15, 1885.

243 In the United States Circuit Court.

THE MISSOURI PACIFIC RAILWAY COMPANY *versus* THE TEXAS AND PACIFIC RAILWAY COMPANY.	No. 11181. Eastern Dist. of La.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY *versus* THE TEXAS AND PACIFIC RAILWAY COMPANY.	Eastern Dist. of La.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY *versus* THE TEXAS AND PACIFIC RAILWAY COMPANY.	Eastern Dist. of La.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY *versus* THE TEXAS AND PACIFIC RAILWAY COMPANY.	Eastern Dist. of La.

To the honorable the judges of the said circuit court:

Your petitioner, John C. Brown, as receiver of the Texas and Pacific railway and its property in the above entitled and numbered causes, represents that heretofore it has been made to appear to the court that the objects and purposes of all the bills in these causes have been accomplished by settlement and agreement of the parties, and evidence of that fact filed as part of the record.

That on it being so made to appear the court ordered him to render his accounts as receiver up to the first of June, which has been done, and it has been examined and approved, and since that date petitioner had kept his account as with the company.

244 By the same order he was directed to hold the property under the orders of the court until the first of June, 1888, at which time, if said order was not vacated, the railway company might operate the road under such orders as the court might make from time to time and under the supervision and control of the receiver. No formal delivery of the road and property in his hands has been made to said railway company, and petitioner now asks that he be allowed formally to deliver all property and funds in his hands as such receiver to said railway company, and that he be allowed to account to said company according to his account filed up to the first of June and for all receipts and expenditures by him received and made since the first of June.

He has carried over on the present books of the company the cash balance and all other balances of property and assets as found in his hands by his report to the first of June aforesaid, and he is now the president of said railway company, and after his discharge will be in possession of all said company's road, property, and funds as such for said company. Wherefore he asks that he be discharged from his said receivership, and that his bond as receiver be vacated and

annulled on payments of all costs legally taxable; but he prays the court to make such order as will charge the property so turned over in the hands of said railway company and its assigns with all liability for which he as receiver is or might be held personally liable.

Your petitioner further says that the sum of his compensation as receiver has been agreed on by the parties in interest and is satisfactory to him, and has been settled up to the 31st day of October, 1888, at which time he asks that his discharge take effect.

(Signed) JOHN C. BROWN.

(Filed October 26th, 1888.)

245 *Order on Petition of John C. Brown, Receiver, for Discharge.*

THE MISSOURI PACIFIC RAILWAY COMPANY *versus* THE TEXAS AND PACIFIC RAILWAY COMPANY. } No. 11181.

On consideration of the foregoing petition it is now ordered, adjudged, and decreed that the prayer of the same be granted, and accordingly that Jno. C. Brown, receiver of the property of the Texas and Pacific Railway Company in the above-entitled causes, be, and is hereby, directed to make delivery unto said Texas and Pacific Railway Company of all property, funds, and assets in his hands as such receiver, and that he be directed to account to said company according to his account filed and approved up to June first, 1888, and for all receipts and expenditures by him received and made since the said first of June, 1888. Such delivery will be made as of Oct. 31st, 1888.

It is further ordered that said receiver be finally discharged, on said 31st Oct., 1888, from his receivership on payment of all costs legally taxed, and that thereupon his bond be vacated and cancelled.

It is further ordered that said property, nevertheless, shall be delivered to and received by said Texas and Pacific Railway Company, subject to and charged with all traffic liabilities due to connecting lines and all contracts for which said receiver is or might be held, made, or in any way liable, and subject also to any and all judgments which have heretofore been rendered in favor of intervenors in this case and which have not been paid, as well as to such judgments as may be hereafter rendered by the court in favor of intervenors while it retains the cases for these determina-
246 tions on interventions now pending and undetermined or which may be filed prior to February, 1889, together with needful expenses of defending said claims, and upon the condition that such liabilities and obligations of the receiver, when so recognized and adjudged, may be enforced against said property in the hands of said company or its assigns to the same extent that they could have been enforced if said property had not been surrendered into the possession of said company and was still in the hands of

the court, and with the further condition that the court may, if needful for the protection of the receiver's obligations and liabilities so recognized by this court, resume possession of said property.

The bills in these clauses will be retained for the purpose of investigating such liabilities and obligations and for such other purpose as may seem needful. It is ordered that all claims against the receiver as such up to said 31st of Oct., 1888, be presented and prosecuted by intervention prior to February 1st, 1889, and if not so presented by that date that the same be barred, and shall not be a charge on the property of said company.

It is further ordered that the said receiver advertise in a daily newspaper in New Orleans and in Dallas the fact of his discharge and a notice to said claimants to make claim within the time aforesaid, to wit, before the 1st of February, 1889, and that he post a printed notice of similar purport in the station-houses of said railway.

New Orleans, Oct. 26th, 1888.

(Signed) *JNO.* A. PARDEE,
Circuit Judge.

247 *Answer of the Defendant.*

THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation Incorporated under the Laws of the State of Missouri and a Citizen of said State of Missouri,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY, a Corporation Created by and Existing under Certain Acts of Congress of the United States.
No. 11181.

The answer of The Texas and Pacific Railway Company to the bill of complaint of The Missouri Pacific Railway Company.

To the honorable the judges of the circuit court of the United States for the eastern district of Louisiana:

The defendant, The Texas and Pacific Railway Company, for answer to the plaintiff's bill of complaint or to such parts thereof as it is advised is or are material for it to answer unto, says:

I.

It admits the corporate capacity of complainant and defendant and their respective residence as alleged.

II.

The defendant admits that the facts alleged in paragraphs 1 to 19, inclusive, of complainant's bill are substantially true as therein alleged and set forth.

III.

It admits that the facts as alleged in paragraph 20 of complainant's bill are true except as to the lien therein set up

248 by the complainant for the indebtedness which it claims. Whether it has such lien as claimed, or, in fact, any lien, defendant submits to the court.

IV.

In answer to paragraph 21 of complainant's bill, defendant admits its road-bed is not in such condition as to enable it to discharge its duties to the public as promptly and faithfully as is its duty to do, and admits that its present condition results from its earnings not being sufficient to pay its fixed charges and maintain its track in proper condition. It also admits that it has applied its earnings, after paying operating expenses, to the payment of its fixed charges to the neglect of a proper maintenance of its road-bed as well as to the payment of the advances made by complainant.

V.

Defendant admits that paragraphs 22 to 26, inclusive, are true in substance as therein alleged, so far as they allege facts. All questions of law arising therein, as claimed by complainant, defendant submits to the court.

Now, having fully answered, this defendant submits itself to such orders as to this honorable court may seem right and proper in the premises.

JAS. A. BAKER,
Solicitor for Defendant.
W. W. HOWE,
For Defendant.

(Filed December 15, 1885.)

249 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the supreme court of the States of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Texas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Texas and Pacific Railway Company, plaintiff in error, and Nancy J. Gay and Bessie Gay, as defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Con-
250 stitution or of a treaty or statute of or commission held under the United States and the decision was against the title,

right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14 day of June, in the year of our Lord one thousand eight hundred and ninety-five.

D. H. HART,
Clerk U. S. Circuit Court, Western District of Texas, at Austin Texas.

Allowed by—
R. R. GAINES,
Chief Justice of the Supreme Court of the State of Texas.

This June 14, 1895.

[Endorsed:] Filed in supreme court, at Austin, Texas, Jun- 14, 1895. Chas. S. Morse, clerk.

AUSTIN, TEXAS, *June* 14, 1895.

The plaintiff in error has this day lodged in my office a copy of the within writ of error for Nancy J. Gay and Bessie Gay, the defendants in error.

CHAS. S. MORSE,
Clerk of the Supreme Court of Texas.

251 UNITED STATES OF AMERICA, *ss:*

To Nancy J. Gay and Bessie Gay or their attorneys of record, F. M. Ball, Robert McCart, and R. M. Wynne, all of whom reside in the county of Tarrant, State of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Texas, in a suit wherein The Texas and Pacific Railway Company is plaintiff in error and you, the said Nancy J. Gay and Bessie Gay, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. R. Gaines, chief justice of the supreme court of the State of Texas, this 14th day of June, in the year of our Lord one thousand eight hundred and ninety-five.

R. R. GAINES,
Chief Justice of the Supreme Court of the State of Texas.

We hereby accept service of the within citation and acknowledge service of a true copy of same this June 15, 1895.

F. W. BALL &
R. M. WYNNE &
ROB'T McCART,
Attorneys of Record for Nancy J. and Bessie Gay.

252 Know all men by these presents that we, the Texas and Pacific Railway Company, as principal, and —— ——, as sureties, are held and firmly bound unto Nancy J. Gay and Bessie Gay in the full and just sum of fifteen thousand dollars, to be paid to the said Nancy J. Gay and Bessie Gay, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14 day of June, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a regular term of the supreme court of the State of Texas, in a suit depending in said court between The Texas and Pacific Railway Company, plaintiff in error, and the said Nancy J. Gay and Bessie Gay, as defendants in error, a judgment was rendered against the said The Texas and Pacific Railway Company, and the said The Texas and Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Nancy J. Gay and Bessie Gay or their attorneys, F. M. Ball, Robert McCart, and R. M. Wynne, all of whom reside in Tarrant county, Texas, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said The Texas and Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By T. J. FREEMAN, *Its Attorney.* [SEAL.]
W. C. TURNER. [SEAL.]
H. C. EDRINGTON. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by—
R. R. GAINES,
Chief Justice Supreme Court of the State of Texas.
This June 14, 1895.

[Endorsed:] Filed in supreme court, at Austin, Texas, Jun- 14, 1895. Chas. S. Morse, clerk.

Certificate of Solvency of Bond.

THE STATE OF TEXAS, }
County of Tarrant. }

I, R. H. McNatt, clerk of the district court in and for the county and State aforesaid, do hereby certify that W. G. Turner and H. C. Edrington, whose names appear signed to the annexed bond, are good and ample security for the amount therein stipulated; that *he* have property in said county subject to execution to a larger amount, and that if said bond was offered to me for approval the same would be accepted and approved.

[SEAL.] In testimony whereof I hereunto sign my name officially and affix the seal of the district court — Tarrant county, at office, in the city of Fort Worth, this 14th day of June, A. D. 1895.

(Signed) R. H. MCNATT,
Clerk District Court, Tarrant Co., Texas,
By GEO. C. WARD, *Deputy.*

253 THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
NANCY J. GAY and BESSIE GAY, Defendants in Error. } No. 250.

In the Supreme Court of the State of Texas.

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

First. The supreme court of the State of Texas erred in its judgment affirming the judgment of the district court of Tarrant county in that it failed to give due and proper effect to the orders and decrees of the circuit court of the United States for the eastern district of Louisiana and the northern district of Texas, appointing John C. Brown the receiver of the Texas and Pacific railway, and in deciding that the said John C. Brown was never duly appointed the receiver of the Texas and Pacific railway, and that the orders and decrees of the circuit court of the United States for the eastern district of Louisiana and for the northern district of Texas were invalid and void.

Second. The supreme court of the State of Texas erred in holding and deciding that the orders and decrees of the circuit court of the United States for the eastern district of Louisiana, made and entered in the suits of The Missouri Pacific Railway Company *vs.* The Texas and Pacific Railway Company, equity, No. 11181, and The Fidelity Insurance, Trust and Safe Deposit Company *vs.* The

Texas and Pacific Railway Company, appointing Lionel A. Sheldon and John C. Brown receivers of the Texas and Pacific railway, were void and invalid, and in refusing to give due and proper effect to said orders and decrees of said court.

254 Third. Under and by virtue of the laws of the State of Texas in effect at the time the defendants in error's cause of action accrued herein no cause of action could be maintained against receivers of railway corporations for injuries resulting in death, and the supreme court of the State of Texas erred in holding that John C. Brown was never a receiver of the Texas and Pacific railway, and that the order of the circuit court of the United States for the eastern district of Louisiana made on the 16th day of December, 1885, in the suit of The Missouri Pacific Railway Company *vs.* The Texas and Pacific Railway Company, and The Fidelity Insurance, Trust and Safe Deposit Company *vs.* The Texas and Pacific Railway Company, appointing the said Lionel A. Sheldon and John C. Brown receivers of the Texas and Pacific railway, which said order appointing said Lionel A. Sheldon and John C. Brown was duly and regularly affirmed by a subsequent order of said court made and entered on the 9th day of January, 1886, was invalid and void as to the property of the Texas and Pacific Railway Company in the State of Texas, and in holding that said circuit court of the United States for the eastern district of Louisiana was without jurisdiction as to the making of said order, and that the effect of said order was not to appoint the said John C. Brown a receiver of the Texas and Pacific railway as to its property in Texas, and in refusing to give due and proper effect to said orders and decrees appointing said John C. Brown receiver of the said The Texas and Pacific railway; that the Texas and Pacific Railway Company relied upon said order appointing the said John C. Brown as receiver as a complete defense to the cause of action herein, and that said court refused to give due and proper effect to said order, and found against the claim, right, privilege, immunity, and defense so specially set up and relied upon by the plaintiff in error herein.

Wherefore The Texas and Pacific Railway Company, plaintiff in error, prays that said judgment or decree be reversed; and it will ever pray.

T. J. FREEMAN AND
GEORGE THOMPSON,
Attorneys for T. & P. R'y Co.

[Endorsed:] No. 250. The Texas & Pacific R'y Co., pl'ff in error, *vs.* Nancy J. Gay & Bessie Gay, defend'ts in error. Assignments of error. Filed in supreme court of Texas June 14, 1895.

255 STATE OF TEXAS, }
County of Travis. }

I, Chas. S. Morse, clerk of the supreme court of the State of Texas, do hereby certify that the foregoing two hundred and fifty-four pages contain a full, true, and correct transcript of the record and

all the proceedings in cause No. 250, wherein The Texas and Pacific Railway Company is plaintiff in error and Nancy J. Gay and Bessie Gay are defendants in error, except that the original petition for writ of error, the original writ of error and citation in error, and assignments of error which were filed perfecting the writ of error to the Supreme Court of the United States are included therein, instead of copies thereof, as fully as the same remains on file and of record in my office, in the city of Austin, Travis county, Texas.

Seal Supreme Court of the State of Texas.

Witness my hand officially and the seal of said court, at Austin, Texas, this the third day of July, A. D. 1895.

CHAS. S. MORSE,
Clerk Supreme Court of the State of Texas.

Endorsed on cover: Case No. 15,946. Texas supreme court. Term No., 298. The Texas & Pacific Railway Company, plaintiff in error, *vs.* Nancy J. Gay and Bessie Gay. Filed July 12th, 1895.

167-745

167-745

APR 27 189
JAMES H. McKENNA

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 298.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

NANCY J. GAY and BESSIE GAY.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for the Railway Company.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. NANCY J. GAY and BESSIE GAY.	No. 298.

Brief for Plaintiff in Error.

Statement.

This suit was originally brought in the District Court of Tarrant County, Texas, February 6th, 1888, against John C. Brown, as receiver. Plaintiffs, who are respectively the widow and daughter of one John M. Gay, in their original petition alleged that the said Brown had been appointed receiver of the Texas and Pacific Railway Company " by the United States Circuit Court *at Dallas* in a certain case pending in said court entitled The Missouri Pacific Railway Company vs. Texas and Pacific Railway Company " (Tr., p. 1).

The purpose of the suit was to recover damages for the death on January 23, 1888, of said John M. Gay,

who was a fireman in the employ of said receiver, caused, as was alleged, by the negligence of said receiver in permitting the use of defective appliances.

The defendant Brown demurred generally, and specially on the ground that he was a receiver, &c., entered a general denial and filed a special plea to the jurisdiction (Tr., pp. 2, 3). There was a verdict and judgment against said Brown entered February 28th, 1889 (Tr., p. 3). That judgment was reversed on appeal (Brown vs. Gay, 76 Tex., 444), (Tr., p. 102). The Supreme Court of Texas in this case said: "This petition stated no cause of action for the reason that the statute allowing damages for injuries resulting in death did not at that time include a receiver (Turner vs. Cross & Eddy, Receivers, 83 Tex., 218)", (Tr., pp. 90, 91).

On May 17, 1890, after said reversal of the judgment against Brown, Receiver, plaintiffs filed a "Second Amended Supplemental Petition" (Tr., pp. 8-15), alleging that The Texas and Pacific Railway Company was also liable with said receiver to the plaintiffs, and making said railway company a party to the action. They also set out at length certain allegations tending to show that said receiver was appointed by the Circuit Court of the United States *for the Eastern District of Louisiana* through the fraud and collusion of the parties to the foreclosure suit pending in that court. They further alleged that, while said Brown was ostensibly the receiver and officer of said court, he was in truth and in fact during the whole of the time between his appointment and discharge (which included the time of the accident to said John M. Gay), the agent and servant of The Texas and Pacific Railway Company and the Missouri Pacific Railway Company and was operating the said railroad for their use and benefit.

(The bill filed in the said Circuit Court of the United States for the Eastern District of Louisiana, the answer of the defendant, order appointing receivers, petition for discharge and order discharging the receivers were offered in evidence by plaintiffs, and will be found in the Transcript of Record, pp. 34 to 54.)

The Texas and Pacific Railway Company appeared and (Tr., pp. 16–18) demurred to said supplemental petition on various grounds; denied negligence on its part; alleged the contributory negligence of the said John M. Gay, and further alleged that, by the final order of the Circuit Court of Louisiana discharging the receiver, the bills were retained for the purpose of investigating the liabilities and responsibilities of said receiver. A copy of the petition for discharge and of said final discharge were attached to said answer (Tr., pp. 19, 20).

The death of John C. Brown having been suggested, the case was dismissed as to him (Tr., p. 22).

The trial by jury resulted in a verdict and judgment in favor of plaintiffs for $7,500 (Tr., p. 22).

An appeal was taken to the Supreme Court, and by that court the case was transferred to the Court of Civil Appeals for the Second Supreme Judicial District (Tr., p. 77). On November 28, 1893, the Court of Civil Appeals certified to the Supreme Court the following questions (Tr., p. 101):

FIRST. Did the Circuit Court of the United States, sitting in and for the district of Louisiana, have jurisdiction to take possession through a receiver of that part of the road situated in the State and northern district of Texas?

SECOND. If no such power existed, would the negligent act of a receiver thus appointed, resulting in death while operating the road in Parker County, Texas, make the company liable?

THIRD. Would the company be liable for such negligent act if the receiver was appointed and discharged and the property restored to it by consent and collusion, as alleged by appellees, whether the court making the appointment had or did not have the requisite jurisdiction? And, if the court had jurisdiction, could that issue be made available in this suit?

FOURTH. If a collusive and fraudulent receivership was shown; or, rather, if that was the proper deduction from the undisputed evidence, was the court required to submit the issue to the jury before a judgment could be entered on the general verdict finding negligence?

FIFTH. In what, if any, state of the case as above set forth would appellees be precluded from disputing the validity of the appointment of the receiver, the deceased fireman having contracted with him in that capacity?

SIXTH. In any state of the case, as above set forth, would the statute of limitation preclude a recovery?

SEVENTH. If appellant could be held liable for the death loss in question on the ground of a collusive and void receivership, as alleged upon a verdict finding that issue in favor of appellees, should the judgment be reversed for fundamental error where the pleading and proof raised the issue, and no error is assigned for failure to submit it to the jury?

EIGHTH. As deceased was killed since the act of Congress of March 3d, 1887, relating to Federal receiverships, what effect, if any, did it have on the issues involved as set up in the pleadings?

The opinion of the Supreme Court of Texas on the questions so certified will be found at pages 102 to 131 of the Transcript. That court answered the *first* question in the negative, the *second* and *third* in the affirmative; the *fourth* in the negative; to the *fifth* it replied that the appellees were not precluded from disputing the validity of the appointment of the receiver; the *sixth* and *seventh* in the negative, and to the *eighth* it answered that, as the receiver was no longer a party to the action, the act of congress referred to was not involved.

The Court of Civil Appeals affirmed the judgment below stating conclusions of fact and of law (Tr., pp. 77–79).

Appellants moved the court (Tr., p. 80) to file additional conclusions of fact upon the following points:

1. Does the record, in the opinion of the court, show that the receiver, John C. Brown, was appointed and discharged, and that the property which was committed to his charge and control as such receiver was restored to appellant by collusion; and, if so, upon what matters contained in the record is that opinion predicated?

2. Does the record or not show that the issue of a collusive and void receivership was submitted by the district court to the jury, and does it or not show that there was a finding by the jury upon the issue of a collusive and void receivership?

The court filed additional conclusions (Tr., p. 81) stating that

"these issues were not submitted to the jury upon the trial of this case by the court's charge, though the issues were made by the pleadings and proof; that appellant did not request their submission to the jury, and that, therefore, they were not specifically passed upon by the jury, unless included within the general verdict in favor of appellees."

A writ of error was then sued out and the judgment of the court of civil appeals was affirmed by the Supreme Court (Tr., p. 91).

The case is now in this court on writ of error allowed by the Chief-Justice of the Supreme Court of the State of Texas.

Assignment of Errors.

I.

The Supreme Court of the State of Texas erred in its judgment affirming the judgment of the district court of Tarrant county in that it failed to give due and proper effect to the orders and decrees of the circuit court of the United States for the eastern district of Louisiana and the northern district of Texas, appointing John C. Brown the receiver of the Texas and Pacific railway, and in deciding that the said John C. Brown was never duly appointed the receiver of the Texas and Pacific Railway, and that the orders and decrees of the circuit court of the United States for the eastern district of Louisiana and for the northern district of Texas were invalid and void.

II.

The supreme court of the State of Texas erred in holding and deciding that the orders and decrees of the circuit court of the United Stated for the eastern district of Louisiana, made and entered in the suits of The Missouri Pacific Railway Company vs. The Texas and Pacific Railway Company, equity, No. 11,181, and The Fidelity Insurance Trust and Safe Deposit Company vs. The Texas and Pacific Railway Company, appointing Lionel A. Sheldon and John C. Brown receivers of the Texas and Pacific railway, were void and invalid, and in refusing to give due and proper effect to said orders and decrees of said court.

III.

Under and by virtue of the laws of the State of Texas in effect at the time the defendants in error's cause of action accrued herein no cause of action could be maintained against receivers of railway corporations for injuries resulting in death, and the supreme court of the State of Texas erred in holding that John C. Brown was never a receiver of the Texas and Pacific railway, and that the order of the Circuit Court of the

United States for the eastern district of Louisiana made on the 16th day of December, 1885, in the suit of The Missouri Pacific Railway Company vs. The Texas and Pacific Railway Company and The Fidelity Insurance, Trust and Safe Deposit Company vs. The Texas and Pacific Railway Company, appointing the said Lionel A. Sheldon and John C. Brown receivers of the Texas and Pacific Railway Company, which said order appointing said Lionel A. Sheldon and John C. Brown was duly and regularly affirmed by a subsequent order of said court made and entered on the 9th day of January, 1886, was invalid and void as to the property of the Texas and Pacific Railway Company in the State of Texas, and in holding that said circuit court of the United States for the eastern district of Louisiana was without jurisdiction as to the making of said order, and that the effect of said order was not to appoint the said John C. Brown a receiver of the Texas and Pacific railway as to its property in Texas and in refusing to give due and proper effect to said orders and decrees appointing said John C. Brown receiver of the said The Texas and Pacific railway; that the Texas and Pacific Railway Company relied upon said order appointing the said John C. Brown as receiver as a complete defense to the cause of action herein, and that said court refused to give due and proper effect to said order, and found against the claim, right, privilege, immunity and defense so specially set up and relied upon by the plaintiff in error herein.

Argument.

I.

The record presents a Federal question.

The order of the Circuit Court of the United States for the Eastern District of Louisiana *discharging* the receiver John C. Brown, who was originally the only party defendant in the case at bar, was before this

court in *Texas and Pacific Railway company vs. Johnson*, 151 U. S., 81. In that case, which also came to this Court from the Supreme Court of the State of Texas, it was held that the overruling of a defense that plaintiff was subject to the order discharging the receiver " amounted to a decision against the validity of the order, or against a claim of right or immunity thereunder " (p. 99).

In the case now presented the Supreme Court of Texas has denied the validity of the order *appointing* John C. Brown, receiver of the property of The Texas and Pacific Railway Company, made by the same Court and in the same case.

As the defendant below—plaintiff in error here—relied upon said order appointing the receiver as a complete defense to this action, the record clearly presents a Federal question under the ruling in the *Johnson case*.

The importance of this point is apparent from the admitted fact that when the cause of action in this case arose the statute of Texas allowing damages for injuries resulting in death did not include actions against receivers.

Turner vs. Cross & Eddy, Recrs., 83 Tex., 218; followed in
Yocum vs. Receivers, 83 Tex., 607.
Railway Co. vs. Warner, 84 Tex., 122.
Railway Co. vs. Bledsoe, 2 Tex. App., 89.
Dillingham vs. Kelley, 8 Tex. App., 113; and see opinion in this case, Tr., pp. 90, 91.

II.

The Courts of Texas failed to give due and proper effect to the orders of the Circuit Court of the United States for the Eastern District of Louisiana, appointing and confirming John C. Brown Receiver of The Texas and Pacific Railway Company's property.

When plaintiff failed to sustain their judgment against J. C. Brown, Receiver, by reason of the fact that the statute of Texas allowing recoveries for injuries resulting in death did not authorize suits on such causes of actions against Receivers (Tr., pp. 90, 91), they filed a supplemental petition making the Texas and Pacific Railway Company a defendant, and alleging facts tending to show that the appointment had been obtained by collusion unknown to the Court which made the order, and contended that said Brown was not actually a Receiver, but merely the agent of the parties to the original foreclosure suit in Louisiana.

The only evidence offered in support of these allegations consisted of the pleadings, orders and other papers filed in the original case in the Federal Court which were related to the appointment and discharge of the receiver. No reference was made to this feature of the case by the trial judge in his charge to the jury, and the only finding on these allegations, if there was any at all, is to be deduced from the general verdict in favor of the plaintiff. The Supreme Court of Texas sustained these proceedings as lawful (see questions certified by the Court of Civil Appeals, Tr., p. 101, and

opinion of the Supreme Court thereon, Tr., pp. 102–131, and final opinion, Tr., pp. 90–04).

A.

By the first and second assignments of error exception is taken to the action of the Supreme Court of Texas in deciding that said John C. Brown was not lawfully appointed receiver by the Federal Court of Louisiana, and that the order of said Court appointing him receiver was invalid and void.

The question presented by these assignments of error is whether or not the Courts of Texas have power, in a collateral proceeding, to declare ineffective, or invalid and void, orders of a Federal court, said court having undoubted jurisdiction of the cause and of the parties. That such power is not lodged in any court in a collateral proceeding seems to be well established.

"While the appointment of a receiver rests in the discretion of the court, it is conclusive in all collateral proceedings where the record on its face shows that the Court had power to act in the premises; and, although it may be erroneous and a proper subject of revision, it is not void nor open to collateral attacks."

Beach on Receivers, § 170, citing:
Lutt vs. Grimont, 17 Bradw., 308, 313.
Edrington vs. Pridhom, 65 Tex., 612.
Dean vs. Thatcher, 32 N. J. L., 470.
Wood vs. Blythe, 46 Wis., 650.
Keokuk Northern, &c., vs. Davidson, 13 Mo. App., 565.
Mercantile Tr. Co. vs. Pittsburgh, &c., Co., 29 Fed Rep., 732.

In *Cook vs. The Citizens National Bank*, 73 Ind., 256, 259, Woods, J., said:

"The appellant was not a party to that action, and cannot, in the prosecution of his appeal from the order made against him [an order directing a chattel mortgagee to pay into court the net proceeds of the sale of

the mortgaged property], be allowed to assign error on the record of the foreclosure suit. Whether the action of the court in appointing a receiver was according to law we need not decide. If the appointment was erroneous, it was not void, and can not, in a collateral proceeding, be assailed, even by the parties thereto, and certainly not by strangers in the attitude of the appellant.

"'It is immaterial,' says Kerr on Receivers, p. 166, 'that the order appointing a receiver may have been improper or erroneous. It is not competent for any one to interfere with the possession of a receiver on the ground that the order appointing him ought not to have been made. It is enough that it be a subsisting order.'"

And see,

Richards vs. People, &c., 81 Ill., 551, 554.
Bodkin vs. Merit, 102 Ind., 293, 299.

In *Oglesby vs. Attrill, 105 U. S., 605, 611*, Mr. Justice FIELD, referring to a "compromise" under the Code of Louisiana, said:

"No allegations of fraud, in addition to those made at the settlement, can prevent the compromise from having effect as a judgment thereon. It may, indeed, by a direct proceeding instituted for that purpose, be rescinded for fraud, *but it cannot, any more than any other judgment, be attacked collaterally.*"

We do not dispute or question the established rule that the Courts of one State may inquire into the jurisdiction of a Court rendering judgment in another State over the subject matter or the parties affected by it, nor into the facts necessary to give such jurisdiction, as announced in *Simmons vs. Saul, 138 U. S., 439*, but in this aspect of the case we insist there is no question as to the jurisdiction of the Louisiana Court over the subject matter nor over the parties. The ground upon which the Supreme Court of Texas held the order of the Louisiana

Court by which the receiver was appointed invalid was that there was collusion by which the Court, in exercising its discretion, was misled into making the order. As there were no other facts before the Texas Court than were before the Louisiana Court, the only reasonable inference is that the Texas Court on the same facts took a different view of the matter than the Louisiana Court did and practically announced that if the case had been presented to it on the same application, it would have exercised its discretion in a different way and would have refused to make an order appointing receivers.

The deliberate act of a Court of one State cannot assuredly be attacked in a collateral action in another State on such grounds.

The order of the Louisiana Court might be voidable in a direct proceeding for its annulment, but it certainly is not to be declared void in a collateral action, especially when, as is not denied here, the Receiver performed his duties until he was formally discharged without question and without challenge. As was said by Mr. Justice HARLAN in *Union Trust Co. vs. Southern Inland Nav. & Imp. Co.*, 130 U. S., 565, 572, referring to a decree which rescinded a certain agreement: "If "erroneous, it could only be avoided by an appeal. "It cannot be questioned in this collateral proceeding."

B.

By the third assignment of error exception was taken to the action of the Supreme Court of Texas in deciding that the order of the Federal Court in Louisaina appointing said Brown receiver of the property of the Texas and Pacific Railway Company was invalid and

void as to the property of said railway company situated in the State of Texas, and that said Federal Court was without jurisdiction to make said order as to said property in Texas.

By the order of the Circuit Court of the United States for the Eastern District of Louisiana, filed December 16, 1885 (Tr., p. 46), being the order the validity of which is denied by the Supreme Court of Texas. Lionel A. Sheldon and John C. Brown were appointed

"joint receivers of all the said railroads of the defendant company, *both in Louisiana and in Texas*, and of all the property of said company, with full power and instructions hereby to take possession, custody and control of all the property, rights and franchises, money, books, accounts, lands and premises of every description of the said defendant Company, or to which it has right *in Louisiana and in Texas*, and wherever situated, and to manage, operate and maintain the said lines of railroad of the said defendant company, with authority to employ such officers, agents and employees and counsel as may be necessary to preserve and protect all the property of the defendant company, and to keep it open as a public highway," &c.

[NOTE.—As matter of fact, ancillary proceedings were instituted in every District in Texas through which the railroads so placed in the hands of the receivers ran, and similar orders were entered in the several Federal Courts in those Districts, but the record now before the Court does not include such ancillary proceedings. Plaintiff's first allegation was that the receiver was appointed by the Circuit Court *at Dallas* (Tr., p. 1; *ante*, p. 1.]

Upon the resignation of said Sheldon, John C. Brown was continued in office as sole receiver (Tr., p. 48), and acted as such until his final discharge. His right to act as receiver has never been questioned in any direct

proceeding to test the validity of his appointment or otherwise to our knowledge.

But in this collateral proceeding and by a supplemental petition filed May 17, 1890 (Tr., p. 15), more than a year after the receiver's final discharge, October 26, 1888 (Tr., pp. 53, 54), it was assailed for the apparent purpose of enabling the Courts of Texas to pronounce a judgment in favor of the plaintiffs, to which, under the laws of Texas in force at the time the cause of action arose, they were not entitled.

We admit that neither Courts of the United States nor Courts of a State can lawfully by judgment or decree affect the title to real estate not located within their territorial jurisdiction, and that in all controversies to be determined by the *lex rei sita* they have no extra territorial jurisdiction (*Carpenter vs. Strange, 141 U. S., 87*), but we claim that the Courts of the United States of general jurisdiction have power to take possession by means of a receivership of railroad lines, parts of which lie outside of their territorial jurisdiction, and that the possession of the receivers appointed by them for this purpose, and representing the Court, cannot be questioned except by means of a direct proceeding. Their possession and operation of such lines of railway cannot be impeached in a collateral proceeding such as is the case at bar.

The last deliverance of this court bearing upon the point now under consideration was rendered in *Muller vs. Dows, 94 U. S., 444.*

In that case the decree under review was made by the Circuit Court for the District of Iowa, directing the foreclosure and sale of the property of a railway company formed by the consolidation of a company created under the laws of Iowa and one chartered by

the State of Missouri. The line of the consolidated company was situated in both of said States. Objection was made that the decree was void so far as it directed the foreclosure and sale of property not within the territorial jurisdiction of the court. Mr. Justice STRONG said (p. 449):

"If such a foreclosure and sale cannot be made of a railroad which crosses a state line and is within two states, when the entire line is subject to one mortgage, it is certainly to be regretted, and to hold that it cannot be would be disastrous, not only to the companies that own the road, but to the holders of bonds secured by the mortgage. Multitudes of bridges span navigable streams in the United States, streams that are boundaries of two states. These bridges are often mortgaged. Can it be that they cannot be sold as entireties by the decree of a court which has jurisdiction of the mortgagors? A vast number of railroads, partly in one state and partly in an adjoining state, forming continuous lines, have been constructed by consolidated companies, and mortgaged as entireties. It would be safe to say that more than one hundred millions of dollars have been invested on the faith of such mortgages. In many cases these investments are sufficiently insecure at the best. But if the railroad, under legal process, can be sold only in fragments; if, as in this case, where the mortgage is upon the whole line, and includes the franchises of the corporation which made the mortgage, the decree of foreclosure and sale can reach only the part of the road which is within the state, it is plain that the property must be comparatively worthless at the sale. A part of a railroad may be of little value when its ownership is severed from the ownership of another part. And the franchise of the company is not capable of division. In view of this, before we can set aside the decree which was made, it ought to be made clearly to appear beyond the power of the court. Without reference to the English chancery decisions, where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity, sitting in a state and having jurisdiction of the person, may decree

a conveyance by him of land in another state, and may enforce the decree by process against the defendant. True, it can not send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees when they are complainants. In *McElrath vs. The Pittsburg & Steubenville Railroad Co., 55 Penn. St., 189*—a bill for foreclosure of mortgage—in which it appeared that a railroad company, whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the court decreed that the trustee who had brought the suit, being within its jurisdiction, should sell and convey all the mortgaged property, as well as that in the State of West Virginia as that in Pennsylvania. This case is directly in point, and tends to justify the decree made in the present case. The mortgagors here were within the jurisdiction of the present court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made."

The rule thus announced is directly applicable to the case now presented to the Court. Here the corporation whose property was taken into the possession of the Court through the receivership was and is a corporation created under the laws of the United States (16 Stats., 573; amended 17 Stats., 59 and 598 and 18 Stats., 197). Part of its line of railway lay within the State of Texas, and the order of the Federal Court in Louisiana in express terms directed the receiver to take possession of and to operate that part of the line (Tr., fol. 46, quoted *ante* p. 13).

Under these circumstances this case is directly within the rule stated in *Muller vs. Dows*. It is true, as shown by the opinion of the Supreme Court of Texas (Tr., pp. 122, *et seq.*), that some of the Circuit Courts of the United States have questioned the propriety of the rule, but we respectfully submit and urge that, granting that the appointment of a receiver by a court over railway property without its territorial jurisdiction may be questioned and possibly annulled as to such property in a direct proceeding by a court of competent jurisdiction within whose territory the property lies; nevertheless, the possession of the receiver cannot be attacked in a collateral proceeding in any court.

The judgment of the Supreme Court of Texas should be reversed.

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WINSOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED,
APR 27 1897
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 298.

THE TEXAS AND PACIFIC RAILWAY COMPANY

vs.

GAY ET AL.

BRIEF OF W. HALLETT PHILLIPS FOR DEFENDANTS IN ERROR.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 298.

THE TEXAS AND PACIFIC RAILWAY COMPANY

vs.

GAY ET AL.

BRIEF OF W. HALLETT PHILLIPS FOR DEFENDANTS IN ERROR.

This case has been pending for many years in various State courts of Texas. It has been in the supreme court of Texas three times, and each time the liability of the company has been affirmed. The last adjudication by the supreme court of the State was rendered March 18, 1895.

Brown *vs.* Gay, 76 Tex., 444.
Texas & Pacific Railway *vs.* Gay, 86 Tex., 571.
Texas & Pacific Railway *vs.* Gay, 27 S. W. Rep., 742.
Texas & Pacific Railway *vs.* Gay, 30 S. W. Rep., 543.

The company seeks to review the judgment on alleged errors of a Federal character.

The writ of error should be dismissed for want of jurisdiction, or the judgment should be affirmed with damages.

It is plain that the case has been brought here for delay only, as it is governed by Texas and Pacific Railway Company *vs.* Johnson, decided January 3, 1894, 151 U. S., 81; affirmed in Texas and Pacific Railway Company *vs.* Bloom, 164 U. S., 636.

In view of these two decisions, even if the Court should entertain jurisdiction, there is nothing for argument of a serious nature.

The petition was filed in the district court for Tarrant county, Texas, February 6, 1888, by Nancy J. Gay, for herself and as next friend of her minor child, Bessie Gay. It sought to recover a judgment against John C. Brown, receiver of the Texas and Pacific Railway Company, on account of the death of her husband, John M. Gay, a fireman employed on the railroad.

Petitioner alleged that her husband's death was caused by the engine and tank becoming uncoupled, the pin on the engine rising up because it had no key, until the link slipped out and the chains on each side of the tank broke. It is alleged that both engine and tank, as well as the coupling apparatus and machinery, were defective, unsafe, unsound, and unreliable.

That the defendant was guilty of gross negligence, causing the injuries complained of.

By the first and second supplemental petitions, filed respectively April 24, 1890, and May 17, 1890, the Texas and Pacific Railway Company was made a party defendant, and the receiver was dismissed. (R., pp. 4, 8, 22.)

The grounds of the amendment were, among others:

1. "Because said Brown was but the agent and servant of said company during the whole of the time he acted as receiver as aforesaid, and said company was his undisclosed principal, as aforesaid."

2. "By reason of the written agreement whereby said company assumed the payment of all the liabilities incurred

by said Brown during the time he acted as receiver, as aforesaid;" and,

3. "Because of the improvements and betterments made upon said road out of the current receipts thereof, as aforesaid."

On November 17, 1890, the death of John C. Brown was suggested and the cause ordered to abate as to him.

Brown had been discharged as receiver on October 31, 1888, and the Texas and Pacific Railway Company, under orders of the court appointing the receiver, had resumed possession and control of said railway.

On December 1, 1890, the company filed its second amended original answer. (R., p. 16.)

This consisted of eighteen grounds and included a general demurrer, as well as special exceptions.

The district court overruled the general demurrer and all the special exceptions except two, not material on the present hearing.

There was a verdict and judgment against the Texas and Pacific Railway Company for $7,500. (R., p. 22.)

On appeal to the court of civil appeals the judgment was affirmed and a finding of facts filed. (R., 77, 80.)

On appeal it was contended by the company that the railway was not liable for the torts of the receiver. It was also urged that the verdict and judgment were erroneous because the court appointing and discharging the receiver still had equity jurisdiction of the claim and power and authority to provide for its investigation and order of payment.

That any claim against the receiver could only be enforced against the company as an equitable demand; that the claim had first to be reduced to a judgment against the receiver before a creditor's bill could be filed for its payment out of property which had passed into the company's hands.

These questions have already been decided here adversely to plaintiff in error and need not be again argued.

The supreme court of the State affirmed the judgment, and the case is now brought here by the company. (R., p. 94.)

The cause of action was the death of plaintiff's husband, caused by negligence in the management of the road.

At the time the decedent was killed the road was operated by a receiver.

Afterwards, without sale, the property was returned to the company with largely increased value, caused by betterments made by the receiver while administering the property, and the company was made a party in the place of the receiver.

Plaintiff's amended petition, among other allegations, stated that the receiver, Brown, was appointed through collusion between the parties to the receivership suit, and that while ostensibly acting as receiver he was at the same time only the authorized agent of the defendant, The Texas and Pacific Railway, operating the railroad for it and on its behalf, and that the company was responsible, as a principal, for all the acts and derelictions of its agent, Brown.

Liability of the company was sustained by the various courts through which the case was carried.

It was made apparent by proof that the only purpose of the receivership proceeding instituted in the United States circuit court for the eastern district of Louisiana was to shield the complainant from the payment of its just liabilities by means of the appointment of a receiver.

It was also shown that the betterments on the property while in the hands of the receiver were largely in excess of the liability sought to be established.

The supreme court of the State, at an early stage of the proceeding, upon questions certified by the court of civil appeals, discussed the question of the power of the circuit court to appoint the receiver, and held that no jurisdiction existed.

This latter ruling was largely based on the fact that the property was entirely outside of the jurisdiction of the circuit court, and was situated in the State of Texas.

Under the settled rule of this Court, no notice will be taken of a Federal question if the judgment or decree sought to be reviewed is sustainable on any other ground.

The judgment in the present case must remain undisturbed, because not dependent upon any considerations of a Federal character.

Whether the company is liable because of the betterments received with the property and made by the receiver out of the earnings of the company; whether, in point of fact, the receiver was the mere agent of the company; whether the company was liable for the torts of the receiver, are all questions of a general nature which this Court cannot review.

It is of no significance in this connection that a liability was imposed on the company for one or the other of these reasons. The whole case turns on the question whether the company was relieved from liability for damages because they were received while the road was being administered by a receiver. The affirmation of this doctrine is not a decision which imparts jurisdiction to this Court.

In order to maintain jurisdiction, the company must show that it asserted a right or exemption from some Federal source, and such claim is not supported by a finding that the receiver was the mere agent of defendant, or that the company was responsible for the demand. The determination of such a controversy is not an adverse ruling against any right secured to the company by Federal law or authority. It stands on the same footing as the question of betterments and the liability of the company arising from acceptance of the property with such improvements, which is entirely independent of Federal jurisdiction.

No point is involved as to protection of a receiver under the powers conferred upon him by the court.

The only party complaining is the railway, and it does not and cannot claim through the receiver. The company can assert only such exemption as is assured by the decree

restoring to it the road, and that decree is not now in controversy.

When the company received back its property, any persons asserting demands against the corporation, whether arising prior or subsequent to restoration, had a right to prosecute their claims against the corporation.

The whole dispute really involves the single question whether the railway company is responsible for the damages suffered by Gay while the road was administered by a receiver. The reasons upon which the State court affirmed this liability are not material in determining the inquiry whether a Federal question was decided adversely to plaintiff in error. The judgment might be placed on the ground of betterments or assumption of liability by receiving back the road without sale, or upon the ground that the receiver was really the agent of the railway company, or upon the want of power in a court of a foreign jurisdiction to place railway property situated in Texas beyond the reach of those having claims against it in the State. The reasons given for sustaining the liability cannot test the question whether a Federal element was necessarily involved in the determination.

There is no reason for Federal interposition growing out of the enforcement of such a liability by the State courts.

Whether there was collusion between the plaintiff and defendant in the suit for the appointment of a receiver, and whether the facts shown at the trial established that the receiver appointed was really but the agent of the railway company are pure questions of fact, which this Court is not competent to review under well-settled principles.

In Dower *vs.* Richards, 151 U. S., 668, it is said:

> "This Court, in an action at law, has no jurisdiction to review the decision of the highest court of a State upon a pure question of fact, although a Federal question would or would not be presented, according to the way in which the question of fact was decided."

And in Republican River *vs.* Kansas Pacific Railway, 92 U. S., 315, it was observed:

"In cases where the facts are submitted to a jury and are passed upon by the verdict in a common-law action, this Court has the same inability to review those facts in a case coming from a State court that it has in a case coming from the circuit court of the United States. This conclusiveness of the facts found extends to the finding by a State court."

The principle stated in these decisions has frequently been repeated. (Israel *vs.* Arthur, 152 U. S., 362.)

The same rule applies in Texas supreme court, on appeal from the court of civil appeals.

"The decision of said courts (civil appeals) shall be conclusive on all questions of fact brought before them on error or appeal."

Amended Constitution of Texas, art. 5, sections 3–6.
Texas and Pacific Railroad *vs.* Johnson, 37 S. W. Rep., 575.

The judgment need not have been placed upon any other ground, and this Court need not go into the validity of any other proposition which was discussed in the opinion of the supreme court of the State.

The case is governed by Texas and Pacific Railway *vs.* Johnson, 151 U. S., 81. It was there decided that the company, having received back the property under the circumstances mentioned, held it charged with unpaid claims which accrued during the receivership, and that suit was maintainable against the company.

As the highest court of the State had held that the company was directly liable to the plaintiff below, its judgment was affirmed.

Johnson brought suit in a Texas State court against the receiver of the company, which, in 1888, was amended by making the Texas and Pacific Railway Company a party defendant.

An amended petition filed September 17, 1888, states the appointment of the receiver in 1885 by the circuit court of the United States for the eastern district of Louisiana.

That the receiver was discharged October 31, 1888, under an order of October 26, 1888, and that he delivered to the Railway Company all of its property, consisting of the corpus of said railway and all the earnings and income then in his hands as receiver unexpended, and all the land belonging thereto, and all improvements and betterments which had been added to the property by him.

That the receiver was originally appointed at the instigation of and by the consent of the railway company and for its benefit, and that the property in his hands from December 16, 1885, to June 1, 1888, inclusive, was operated and managed by him for the benefit of the defendant company and its property, as originally intended, and that the property, on June 1, 1888, was redelivered to the defendant corporation greatly improved in value, without any sale or foreclosure, and without any third parties acquiring any title thereto or interest therein of any kind.

It was finally averred that—

"The said Brown, as receiver, and under orders and direction of said court and by consent of all parties interested, including defendant company, during the time above mentioned, applied all the receipts, earnings, and income of said railway under said receivership, after the payment of current expenses, to the permanent improvement of said property, to the betterment thereof, and to the purchase of large and valuable additional property for the use and operation of said road, amounting in the aggregate to the sum of three million dollars, all of which money and property is now in the possession of the defendant company as its own and under the conditions heretofore set out. Wherefore the plaintiff brings this suit and prays for citation to defendants according to law, and on final trial for judgment against the defendant John C. Brown, simply establishing the claim of plaintiff against the receivership under his management, and against the Texas and Pacific Railway

Company for his damages, fifty thousand dollars, and to fix upon the said property of the said defendant company in the State of Texas a lien to satisfy the judgment rendered herein, for costs, and such other relief to which plaintiff may be entitled in law or in equity."

The answer of the receiver set forth the order under which he was discharged and the property redelivered to the company.

The company answered, denying any liability and claiming that by the orders of the circuit court discharging the receiver the property was turned over to the company free from such demands as the one sought to be enforced.

The cause was dismissed as to defendant Brown and a verdict and judgment rendered against the company.

It was admitted that the betterments placed on the railroad, paid for out of the earnings of the road in excess the of operating expenses while in the hands of the receiver, were of value sufficient to more than cover the amount claimed by plaintiff.

The supreme court of Texas held that a railway company, in the absence of some statute so providing, was not liable for the acts of its receiver by reason alone of his relation to it, but that if such company and its creditors should by collusion procure a receivership, or if the receiver in fact operated the road under orders of a court without jurisdiction, it would seem that the railway company would be bound by all acts of such receiver.

That a claim for damages caused by injury inflicted through the negligence of the receiver while he was operating the railway is entitled to payment out of current receipts; and if the current earnings be invested by the receiver in betterments on the road, which, without sale, is returned to the company at the close of the receivership, then the company must be held to have received the property charged with any claim which the receiver ought to have paid out of the earnings.

That when a receiver has been discharged and the property all returned to the company under order of the court in which the proceedings were had, the control of the court over the property is ended, and the property, when released from the custody of the court, stands subject to any claim that may rest against it.

That a suit in a State court for personal injuries caused by the negligent operation of the Texas and Pacific railway while in the hands of a receiver could be maintained against the railway company after its property was restored to it.

That after discharging the receiver and restoring the property to its owners, the United States court could not maintain such jurisdiction over the matter as to prevent the prosecution of such claim to judgment and execution.

That jurisdiction here could not be maintained on the ground that a right or immunity was claimed under the authority exercised by the receiver in virtue of the order of the circuit court of the United States.

That the judgment was in favor of the receiver, and the writ of error was brought by the company, and it was well settled that the right or immunity must be one of the plaintiff in error and not of a third person.

The court was confined to the inquiry whether the validity of an authority exercised under the United States in any other regard than above indicated, or any claim under such authority, was denied.

That as the defense was directly made that the plaintiff below was subject to the order of the circuit court, and must therefore resort to the court which entered it for the collection of this claim, and could not recover a judgment *in personam*, collectible by the ordinary process, and, moreover, that his claim was thereby barred, the *overruling of that defense* may properly be held to have amounted to a decision against the validity of the order or against a claim of right or immunity thereunder.

The court observed that the defense that the company

could not remain liable because not responsible for the acts of the receiver was a question of general law which the State court alone could decide.

"These conclusions," say this court, "did not rest upon the order of October 26 as affirmatively imposing a specific liability upon the company, and the only question for us to determine is whether, in ruling that that order did not preclude such a judgment as was rendered, and did not operate to require the defendant in error to submit his judgment to the circuit court of the United States at New Orleans to obtain its collection, in such manner and to such extent as that court might be advised, a claim of right or immunity under an authority exercised under the United States was erroneously decided against."

The court concludes:

"If the recovery of defendant in error and the collection of his judgment had been dependent upon the order or upon any action of the circuit court in his favor in the original suits, two different questions would have been presented; but, as the matter stands, we perceive no aspect in which that order can be treated as operating in limitation of the rights of defendant in error except in the particular of resort to the circuit court, as above indicated." (151 U. S., 82.)

The jurisdiction here is sought to be sustained on the ground that the judgment rests on a declaration by the State court affecting the order of the circuit court appointing the receiver.

It is said that such a decision necessarily denies a right claimed under Federal authority.

We must assume, as has been decided here, that no right as arising under Federal authority can be asserted which accrued to the receiver by virtue of the decree of the circuit court.

The receiver is not now a party and was discharged

when the road was returned to the company, previous to his death.

What, then, is the right which the company asserts for itself depending on the Federal decree?

We say *depending* because it is not sufficient that the court below may have in the course of its decision discussed other grounds which in its judgment justified its ruling in favor of plaintiffs below.

If it were competent for this Court to enter anew upon the question of liability of the company, and if the Court upon such inquiry should determine that it could not rest on settled grounds of a non-Federal nature, it could then determine whether the judgment sought to be reviewed was sustainable on other reasons passed upon in the decision of the State supreme court.

But such an inquiry is needless, in view of the announcement of this Court in the Johnson and Bloom cases and in others of like character.

There can be no doubt that if it was shown in the court below that within the decision of the Johnson case betterments were made by the receiver, and on the property received by the company, in excess of the amount sought to be recovered in the action, this was sufficient upon which to base a judgment against the company.

A like valid basis of judgment was the liability of the company for the torts of the receiver under the facts of the case. Neither of these grounds suggests jurisdiction here to review them.

Texas and Pacific Railway Company *vs.* Johnson was affirmed in Texas & Pacific R'y Co. *vs.* Bloom, 164 U. S., 636.

In this case, when the original petition was filed the road was in the hands of the receiver. The injuries complained of had been suffered during that period. The allegations, as in the case at bar, were that the property had been placed in the hands of the receiver at the instance of the railway company and for its own benefit.

That the property was never sold by the receiver to pay its debts, and was never contemplated to be sold; that the entire earnings and current receipts of the said railroad while in the hands of the receiver, amounting to more than two millions of dollars, were applied to the payment of mortgage debts and in the improvement of the property of the company.

The directions of the decree restoring the property were also set forth.

Judgment was recovered in the United States circuit court for the eastern district of Texas, which on writ of error was affirmed by the United States circuit of appeals for the fifth circuit.

On review here the contention of the company was that the claim of plaintiff was not against the defendant company, but against the receiver operating the road.

That the plaintiff's demand was barred because the circuit court, on discharging the receiver, had declared that if claims were not presented prior to a certain date they should not be a charge on the property.

This Court held that the case was not the ordinary one of a sale and purchase, in which compliance with stipulated conditions formed part of the consideration:

"Here the railroad and its appurtenances, whose value was largely enhanced during the pendency of the receivership, were returned to the possession of the railroad company, and while it was proper for the court, in order to protect its receiver, to make an order for those who had claims against him to bring them forward for disposition, it by no means follows that the company took back its property free from all claims that may have originated during the receivership. Such might be the case if the claim originated in some personal delinquency of the receiver for which he and his bondsmen could be held responsible; but where the claim was incidental to the ordinary management of the railroad, not attributable to personal misconduct of the receiver, and where the court which had appointed the receiver had not been put in possession of a fund by a foreclosure

sale, but had, at the request of the company and its mortgage creditors, restored its property to the railroad company while such a claim was pending, we are unable to conceive that an order of the kind that was made in this case precluded the plaintiff from enforcing her claim."

Such a state of facts the court say discloses a claim against the railroad which was capable of being enforced in the manner sustained by the judgment.

That it was true in the Johnson case the court had held that the question was one of general law for the State court to pass upon, but that with a similar question brought from a circuit court of the United States this Court saw no reason to reach a different conclusion.

"The conduct of the railroad company in procuring, or at least in acquiescing in, the withdrawal of the receivership, and in the discharge of the receiver and the cancellation of his bond, and in accepting the restoration of its road, largely increased in value by the betterments, well affords ground to charge an assumption of such valid claims against the receiver as were not satisfied by him or by the court which discharged him."

There have been several cases decided by this Court involving the liability of the Texas and Pacific Railway Company for injuries suffered while the road was in the hands of the receiver and enforced against the company after the restoration of the property to it.

One of these is Texas and Pacific Railway Company *vs.* Cox, involving a claim for damages on account of injuries. The suit was brought originally against the receiver, in the United States circuit court for the eastern district of Texas.

The plaintiff recovered, and a writ of error to this Court was sued out by the receiver.

The defendant in error had an order entered here substituting the company in the place of the receiver.

This case again came here under the name of Texas and Pacific Railroad *vs.* Anderson.

After this Court had affirmed the judgment in the case of Cox, a mandate was issued commanding execution against the company. This was resisted in the court below on the ground that the original judgment had not been entered against the company, but only against the receiver, and that execution could not issue against the company; that the only remedy of the successful party was to present his judgment to the circuit court, which had appointed the receiver, and submit it to the approval of that tribunal.

The court to which the mandate had been sent did not take this view of the matter, but held that the mandate was conclusive, and authorized execution directly against the company.

Thereupon the company brought the matter here again, and a second time was unsuccessful.

This Court held that its judgment was final; that the effect of the discharge of the receiver, the restoration of the property to the company, and the order of substitution were to make the company directly liable.

Texas & Pacific R'y Co. *vs.* Anderson, 149 U. S., 239.

There are many questions of general or local law discussed in the court below which cannot be considered here.

We have discussed the propositions which it is contended are of a Federal nature. We submit they fail to show jurisdiction here. But if these subjects can now be inquired into, the question arises whether the supreme court of the State correctly ruled on such points adversely to the plaintiff in error.

In Texas and Pacific Railway Company *vs.* Johnson, 76 Tex., 430, afterwards affirmed here, the court said:

"If, however, it should be made to appear, as is contended, that the appointment of the receiver whose acts are in question was collusive and in effect made at the request of and

for the benefit of the company, for the purpose of placing for a time its property beyond the reach of some classes of its creditors, then it might with some propriety be held that the receiver was but the servant or agent of the company, for whose acts it would be as fully responsible as though he was appointed by its stockholders and directors."

The plaintiff below in the present case introduced evidence to show that the company was the mover in the matter of the receivership; that its management in the courts was through an amicable understanding between the company and defendant, adverse to it on the record, with a view to a settlement, not through foreclosure, but by dismissal of the suit, after such a time as its property had been held beyond the reach of such creditors and had been largely augmented in value by improvements made from earnings.

The verdict of the jury and the finding of facts in the court of civil appeals should be conclusive of the truth of these charges.

We cannot see how the Court can review such action or how a Federal element can be derived from facts or a finding of facts. There was no error on questions of law of a Federal character in the instructions of the trial court decided adversely to plaintiff in error in the highest court of the State.

As it has been held both by the supreme court of Texas and by this Court, in the opinions referred to, that the railway company was liable to such a demand as the one in question, the Court may deem it unnecessary to go into the question discussed by the court below as to the jurisdiction of the circuit court of Louisiana to appoint a receiver for the Texas railway.

The result must be the same whether this point is considered or not.

The verdict of the jury was a general one, and we must

assume that it covers all the issues properly raised in the trial court.

The assignment of error in the trial court, in the court of civil appeals, and in the supreme court of the State raise questions already adjudicated here, arising out of the fact that the injury complained of was suffered while the road was in the hands of the receiver.

It embraces the question of the liability of the company after it had received back its property improved by the receiver. Such question, as held in the court below and decided here, is of general or local law. The same is true as to the question of the liability of the company for the torts of the receiver.

In the civil court of appeals it was found as a fact that the property of the company "was placed and continued for two or three years thereafter in the hands of said receiver by the mutual consent of said companies and for their mutual benefit, and that the receiver was but the agent of the company."

These issues were not submitted to the jury, upon the trial of this case, by the court's charge, though the issues were made by the pleadings and proof; that appellant did did not request their submission to the jury, and that therefore they were not specifically passed upon by the jury, unless included within the general verdict in favor of appellees. (Record, p. 81.)

We cannot perceive how error can be formulated as to matters on which specific directions were not requested by the party complaining.

The liability depends on grounds of a general nature or upon propositions already covered by prior decisions.

These affirm that the company is responsible for injuries suffered while the road was in the hands of the receiver, and such liability is enforceable, whether the appointment of the receiver was valid or not.

In Texas and Pacific Railway *vs.* Warner it is said:

"It is no longer an open question in the State of Texas that the company is not relieved from liability for damages because they were received while the road was in the hands of receivers." (29 S. W. Rep., 503.)

The judgment of the supreme court of Texas affirming the judgment of the court of civil appeals is found on page 94 of the Record.

The opinion of the court is contained on pages 90–94, delivered January 10, 1895.

It states particularly the facts showing that the suit for the appointment of the receiver was collusive:

"We are of the opinion that the facts alleged were, if true, sufficient to have authorized the jury to find 'that the appointment of the receiver was obtained through collusion of the parties to the suit in which the appointment was made,' and that in such case the company would be as fully responsible for negligence in the operation of its road through injury resulting to a third person as it would be if its road had been operated under the management of the superintendent appointed by its directory,' and that 'the facts which show such liability may be found in this cause,' or, in other words, while the collusive decree might be binding on the parties thereto to participate in imposing upon the jurisdiction of the Court, it would not be binding upon a third person, even an employé, who could show the collusion and thereby have the receiver treated as the agent of the railway for whose negligence, resulting in delay, it would be responsible." (Texas and Pacific Railway *vs.* Gay, 86 Texas, 604.)

The Court further considered that if the facts as alleged were true, the appointment was a fraudulent imposition upon the Court, and the subsequent holding out to the plaintiffs of its real agent, Brown, as its receiver by the company was a continuing fraudulent concealment of the true facts, excepting the plaintiffs' claim from the operation of the statute.

The court concluded their opinion thus:

"The other questions raised by the application are disposed of adversely to the plaintiff in error in the former opinion in this case on certified questions." (Record, p. 94.)

The questions certified from the court of civil appeals mention that a former judgment against the receiver was reversed and remanded in order that the Texas and Pacific railway might be substituted as party defendant in place of the receiver. (76 Tex., 444, Record, p. 98.)

Among these questions was the following:

"7. If appellant could be held liable for the death loss in question on the ground of a collusive and void receivership, as alleged, upon a verdict finding that issue in favor of appellees, should the judgment be reversed for fundamental error where the pleading and proof raised the issue and no error is assigned for failure to submit it to the jury?"

If the Court should deem it necessary to go into the question of jurisdiction, argued in the first opinion of the supreme court of Texas, involving the appointment of the receiver, they will find a thorough and, we submit, a conclusive discussion of the subject in the opinion of the supreme court, delivered in answer to certain questions certified by the court of civil appeals.

That opinion is so full on the subject that we can add nothing to the discussion.

It is alleged in the assignment of error as cause of jurisdiction here that—

"The Texas and Pacific Railway Company relied upon said order appointing the said John C. Brown as receiver as a complete defense to the cause of action herein, and that said court refused to give due and proper effect to said order and found against the claim, right, privilege, immunity, and defense so specially set up and relied upon by the plaintiff in error herein."

This defense fails to show that the plaintiff in error was accorded any right or immunity by virtue of the order, or that he specially set up or relied upon such order.

The present suit is one against the company and does not involve the decree appointing the receiver so as to constitute a case of Federal cognizance. The decree merely defines the powers of the receiver and can have no effect upon the subsequent liability of the company when the property was restored to it.

The attention of the Court is called to the fact that no objection was interposed to the evidence introduced by plaintiffs to show collusion, and no charge on this point was asked by the defendant company.

A reference to the exceptions and amended answers of the defendant company shows that no question of Federal cognizance, such as is now attempted to be raised, was suggested in the trial court. (Record, p. 16.)

Nor did the assignment of error in that court raise any such question. (Record, p. 73.)

In the motion for rehearing it is claimed that there was error committed by the court because there was such fundamental error on the part of the trial court in omitting to submit the issue of collusion to the jury as to necessitate a reversal of the judgment of the district court without the requesting of a special charge upon the subject by appellant and without any assignment of errors.

This contention is plainly erroneous and is disposed of by the decisions on appeal. (Record, pp. 90, 101, 102.)

The most recent edition of Beach on Receivers, Anderson's edition (1897), p. 199, cites with approbation the decision of the supreme court of Texas in the present case. Thus, under the head of "Effect of collusive and fraudulent appointment," it is said: "Where the receiver of a corporation was appointed through the collusion of it and the plaintiff, it was adjudged that the receiver was the representative and agent of the corporation"—referring to Texas

and Pacific Railway Company against Johnson; same against Gay.

If his appointment is secured by collusion, he is but the representative of the parties, in the sense that they are responsible for his acts (pp. 372–396).

This work also approves the opinion as to the effect of an order appointing a receiver upon property out of the court's jurisdiction, that a court cannot confer on the receiver power to be exercised outside of its territorial jurisdiction by the appointment of a receiver of a railroad situated in another State (pp. 265, 269, 395).

The judgment should be affirmed if the writ of error is not dismissed.

W. Hallett Phillips,
For Defendant in Error.

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IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

JAMES P. MERRITT ET AL.,
APPELLANTS,

vs.

THE PRESIDENT AND TRUSTEES
OF BOWDOIN COLLEGE ET AL.,
APPELLEES.

} IN EQUITY.

RECORD UPON MOTION OF APPELLEES TO DISMISS APPEAL.

BLAKE, WILLIAMS & HARRISON,
GEORGE N. WILLIAMS,
Solicitors for Appellees.

THOMAS H. HUBBARD,
E. S. PILLSBURY,
GEORGE N. WILLIAMS AND
ROBERT Y. HAYNE,
Of Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES OF AMERICA

JAMES P. MERRITT ET AL.,
Appellants,

vs.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE, ET AL.,
Appellees.

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1 # IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

JAMES P. MERRITT ET AL., Appellants,
vs.
THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE ET AL., Appellees.

NOTICE OF MOTION.

To James P. Merritt, Esq., and to Horace W. Philbrook, Esq., his solicitor; and to Harry P. Merritt, Esq., and to Messrs. Rodgers and Paterson, his solicitors:

Please take notice that the appellees in the above entitled cause, appearing specially for the purpose of moving to dismiss the appeal of said appellants, and for no other purpose, will move the above entitled Court, at the Court room thereof in the City of Washington, D. C., on Monday the 3rd day of May, A. D. 1897, at the opening of Court on said day, or as soon thereafter as counsel can be heard, to dismiss the appeal taken in said cause by said James P. Merritt and by said Harry P. Merritt, upon the following grounds, namely:

(1). That no certificate of jurisdiction, or anything equivalent thereto, was ever granted or made by the Judge by whom the demurrer to the bill was heard and decided, and by whom the cause was tried and the decree appealed from made, viz.: the Hon. Thomas P. Hawley; and that no application for any such certificate, or for any equivalent thereto, was ever made to said Judge Hawley; and that Judge McKenna, who did not hear the cause, had no power or authority to grant or make any certificate of jurisdiction.

2 (2). That no certificate was made by Judge McKenna during the term at which he passed upon the pleas to the jurisdiction, and the motion to dismiss for want of jurisdiction, or for nearly three years thereafter.

3 (3.) That no certificate of jurisdiction, or anything equivalent thereto, was granted, made, or applied for during the term of the Court at which the decree appealed from was made entered, and enrolled, or for a long time thereafter.

Said motion will be made upon a duly authenticated copy of the certificate of jurisdiction made in said cause by Hon. Joseph McKenna, and the amendment appended to said certificate and a duly authenticated copy of the final decree in said cause, and upon duly authenticated copies of the notice of the petition of appeal of the said James P. Merritt and Harry P. Merritt, and of the assignment of errors on such appeal and the order allowing said appeal, and the citation thereon (all of which papers are referred to in said certfiicate) and also a duly authenticated copy of the notice of said application of James P. Merritt and Harry P. Merritt for an appeal, which notice was given to the defendants, Prather, Dargie, Reed, Administrator, etc., and Miller, Executor, etc., on the 12th day of December, 1896, and also a duly authenticated copy of the refusal of said defendants, Prather, Dargie, & Miller, to join in said appeal, which said papers are the ones mentioned in the amendment to said certificate made by the Hon. Joseph McKenna on February 24th, 1897, and annexed to said certificate, which said last mentioned papers are referred to in the said amendment to said certificate, and copies of all of which said papers are annexed hereto; and also upon a brief upon this motion, a printed copy of which is served herewith.

BLAKE, WILLIAMS & HARRISON,
GEORGE N. WILLIAMS,
Solicitors for Complainants.
E. S. PILLSBURY,
ROBERT Y. HAYNE,
Of Counsel for Complainant.

CERTIFICATE.

4 In the Circuit Court of the United States, for the Northern District of California, Ninth Circuit.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE, Complainants,
vs.
JAMES P. MERRITT ET AL., Defendants.
} No. 11563 in Equity.

Certificate of the Question of Jurisdiction, to the Supreme Court of the United States.

This is a suit in equity, and the jurisdiction of the suit by this Court, was, and is in issue.

The question of the jurisdiction of the suit by this Court was raised and litigated by demurrer to the bill, by pleas and by motions to dismiss the suit for want of jurisdiction thereof by the Court.

The said demurrer and the said pleas were overruled, and the said motions were denied, and a final decree on the merits, in favor of the complainants, was made and entered on the 18th day of June, 1896.

The bill was filed on the 23d day of February, 1892.

On the 29th day of February, A. D. 1892, certain other parties, including Harry P. Merritt, hereinafter mentioned, through their solicitors, filed in the case a petition to intervene in said cause, which petition is hereby referred to and made a part hereof.

On the 14th day of May, 1892, and in due time, the
5 defendants, James P. Merritt and Frederick A. Merritt, served and filed a demurrer to the bill, duly specifying as its grounds : that this Court has no jurisdiction of this suit, which demurrer is hereby referred to and made a part hereof.

On the 3d day of February, 1893, said demurrer was, after argument, overruled.

On the 6th day of May, 1893, and in due time, the defendant, James P. Merritt, served and filed a plea to the bill, on the ground of a want of jurisdiction of the suit by the Court, as set forth in said plea, which is hereby referred to and made a part hereof.

On the 10th day of July, 1893, said plea was, after argument, held sufficient, and the complainants granted leave to join issue on said plea, which was done.

On the 13th day of July, 1893, the complainants filed a replication to said plea.

On the 27th day of November, 1893, the complainants filed an application for leave to file a supplemental bill making the said Harry P. Merritt a party defendant in this cause, to which application and affidavit in support thereof, reference is hereby made.

Before the hearing of said application for leave to file a supplemental bill, the said Harry P. Merritt filed an application for leave to dismiss his petition for intervention.

The hearing of the application of said Harry P. Merritt to dismiss his petition in intervention, came on first, and after certain evidence and affidavits produced before the Court, to which reference is hereby made, the said application of Harry P.
6 Merritt to dismiss his petition in intervention, was denied. The hearing of the application of the complainants for leave to file a supplemental bill was then taken up, and certain affidavits, to which reference is hereby made, were pro-

duced and read to the Court, and the Court duly granted leave to the complainants to file said supplemental bill.

On the 27th day of November, 1893, the complainants, in pursuance of the leave given them by the Court, as aforesaid, filed a supplemental bill, bringing in Harry P. Merritt as a co-defendant, to which supplemental bill (marked and designated as Corrected Supplemental Bill) reference is hereby made.

On the 6th day of January, 1894, and in due time, said Harry P. Merritt served and filed a demurrer to the bill, and also a demurrer to the supplemental bill, specifying, among the grounds of both said demurrers, that this Court has no jurisdiction of the suit; which demurrers are hereby referred to and made a part hereof.

On the 2nd day of January, 1895, said demurrers were, after argument, overruled.

On the 28th day of November, 1893, defendant James P. Merritt duly served and filed a written motion to dismiss the suit on the ground that the Court had no jurisdiction thereof, said motion being now on file, and the same is hereby referred to and made a part hereof.

On the 7th day of February, 1894, said Harry P. Merritt duly served and filed a written motion to dismiss the suit, upon the ground that the Court had no jurisdiction of the suit, said motion being now on file, and the same is hereby referred to and made a part hereof.

7 Between the time of the filing of the replication to said plea and the filing of the motion of said James P. Merritt to dismiss the suit, certain evidence concerning the jurisdiction of the Court was taken before an examiner of the Court, and duly certified by him, and filed with the Clerk on the 7th day of February, A. D. 1894, being the only evidence filed on that day. There were also filed the deposition of S. J. Young, on October 31st, 1893, and the deposition of T. H. Hubbard, on January 15th, 1894, both of which depositions related to the question of jurisdiction.

Said plea to the jurisdiction and the said motion to dismiss the suit, after a hearing, were overruled and denied, on the 23d day of July, 1894. And the Court in overruling and denying said plea and said motions, filed its grounds therefor, in writing, as shown in the opinion filed that day, of the Honorable Joseph McKenna, Circuit Judge, and now on file, and said opinion is hereby referred to and made a part hereof.

On the 16th day of January, A. D. 1895, the defendant, Harry P. Merritt, filed his answer to the said Corrected Supplemental Bill; and on the day of , the complainants filed a general replication to said answer of said Harry P. Merritt.

The answer of said John A. Stanly and Stephen W. Puring-

ton to the original bill was filed in said cause on the 14th day of April, A. D. 1892; to which answer reference is hereby made.

The answer of James P. Merritt to the original bill was filed in said cause on the 12th day of May, 1892, to which answer of James P. Merritt reference is hereby made; and the complainants duly filed a general replication to the
8 answer of said James P. Merritt.

On the 7th day of March, A. D. 1895, the complainants by leave of the Court duly had and obtained, filed a second supplemental bill, and also an "addendum" thereto, to which supplemental bill and addendum thereto, reference is hereby made, bringing in certain new parties, to wit, George W. Reed, administrator with the will annexed of Catherine M. Garcelon, deceased, and O. C. Miller, executor of the will of Stephen W. Purington, deceased, the said Purington having died since the commencement of the suit.

On the 1st day of April, 1895, the said Harry P. Merritt filed an answer to said second supplemental bill and addendum thereto, to which answer of said Harry P. Merritt, reference is hereby made; and on the 1st day of April, A. D. 1895, said Reed, administrator, etc., filed his answer to said second supplemental bill and addendum, to which answer reference is hereby made; and on the 6th day of April, 1895, the complainants filed a general replication to said answer of said Reed, and also a general replication to the answer of said Harry P. Merritt.

On the 1st day of April, A. D. 1895, said O. C. Miller, executor, etc., filed his answer to said second supplemental bill and addendum, to which answer reference is hereby made; and on the 6th day of April, A. D. 1895, the complainants filed a general replication to said answer of said Miller. On the 16th day of May, A. D. 1895, the complainants, by leave of Court duly had and obtained, filed a third supplemental bill, to which reference is hereby made; and on the 17th day of June, A. D. 1895,
9 the said James P. Merritt filed an answer to said third supplemental bill, to which reference is hereby made; and on the 24th day of June, A. D. 1895, the complainants filed a general replication to said last mentioned answer.

On the 22d of August, 1892, the defendant, Frederick A. Merritt filed a written consent that a decree against him be taken as prayed for in the bill, which consent is hereby referred to and made part hereof.

On the 12th day of May, A. D. 1892, the defendants, Prather and Dargie filed disclaimers in said action, to which disclaimers reference is hereby made.

The cause came on for final hearing before the Honorable Thomas P. Hawley, presiding at the request and in the place of the Honorable Joseph McKenna, upon the issues formed by

said pleadings; and (by the stipulation of all the parties duly filed, and duly approved by the Court), was tried upon the testimony of witnesses examined orally in open Court, and upon certain documentary evidence and depositions read by the respective parties, and upon the testimony of a witness taken by a special examiner appointed by the Court for that purpose—all of which evidence is on file—and upon certain facts admitted by stipulation of the parties placed on file, to which stipulation reference is hereby made.

And on said final hearing, the defendants, James P. Merritt and Harry P. Merritt again made to the Court the same motions to dismiss the suit on the ground of want of jurisdiction thereof by the Court, as they had previously made as above stated.

On the 5th day of June, 1896, the Court rendered a decision for the complainants on the merits, and in doing so over-
10 ruled said motions to dismiss the suit, by saying in writing filed with the Clerk:—

"The views that have been heretofore expressed and the "principles of law that have been discussed and decided by "this Court, in the case (54 Fed., 55; 59 Fed., 6; 63 Fed., 213), "will not be considered, commented upon or reviewed."

The said "63 Fed., 213," is the said opinion by McKenna, Judge, given July 23, 1894, in overruling said plea to the jurisdiction and motions to dismiss the suit, as above stated.

Said decree was afterwards, namely, on the 18th day of June, 1896, signed by said Hon. Thomas P. Hawley, Judge, and filed with the Clerk, and entered and enrolled. After the entry and enrollment of said final decree, nothing whatever was done by the defendants, or either of them, until the 16th day of December, 1896.

On the 16th day of December, 1896, the said James P. Merritt and Harry P. Merritt filed in said Court their petition of appeal to the Supreme Court of the United States, which petition is hereby referred to and made a part hereof. And on the same day, to wit, on the 16th day of December, 1896, the said James P. Merritt and Harry P. Merritt filed with the Clerk of this Court, their assignment of errors on appeal, which assignment of errors is hereby referred to and made a part hereof. Said petition of appeal and said assignment of errors were and each was, on the 16th day of December, 1896, duly served on the solicitors for the complainants as appears from the admission endorsed on each of said papers, but neither said petition nor said assignment was served on the said John A. Stanly; and on the 16th day of December, 1896, the Honorable Joseph Mc-
Kenna, Judge of the Circuit Court, signed upon a paper
11 annexed to said petition for appeal, an order allowing said appeal as prayed for; which order is hereby referred to and made a part hereof.

The citation was issued on the 24th day of December, A. D. 1896, and was served as appears from the endorsement thereon and affidavit appended thereto and not otherwise, each of which papers is hereby referred to and made part hereof. The said proof of service of said citation is hereby referred to and made a part hereof.

Said petition of appeal was presented in open Court, and the Clerk of the Court entered upon the minutes an order substantially the same as the order allowing said appeal, signed by the Judge of the Court, as just mentioned.

On the 25th day of January, 1897, counsel for the said James P. Merritt and counsel for the said Harry P. Merritt, applied to the Court for a certificate of the question of jurisdiction, as asked for in said petition of appeal. The Court directed notice to opposing counsel to be given, which was done.

The counsel for complainants appeared specially on said application, for the purpose of opposing the granting of any certificate on the ground that none had been applied for during the term at which the judgment was rendered, and for no other purpose, and reserved their objections to the giving of said certificate upon the grounds aforesaid.

The facts in relation to the terms of Court, are as follows:

On May 26th, 1896, the Judge of said Circuit Court duly ordered that a special session of the said Court should be
12 held at the Court-room of said Court, in the City of San Francisco, on Friday, the 12th day of June, 1896, at the hour of 11 o'clock, A. M., of which said order notice was duly given as required by law. Said special session was continued by regular adjournment of the Court, from day to day, until and including the 10th day of July, 1896, when the Court adjourned *sine die*. The next regular term of the Court was opened on July 13th, 1896, and continued until and including October 30th, 1896, when the Court adjourned *sine die*; and on November 2d, 1896, the present November term was commenced. On the said 30th day of January, the Court, after hearing the objections of counsel for the complainants to the giving of any certificate, grants this certificate, to which action of the Court counsel for complainants except. And thereafter, counsel for complainants, reserving the said objections, proposed amendments to this certificate, some of which amendments were, after argument, allowed and inserted.

The said 16th day of December, 1896, and the 25th day of January, 1897, and the 30th day of January, 1897, and the date hereof, are all days of the same term of this Circuit Court.

The jurisdiction of the suit by this Court was. and is, disputed and litigated by the defendants James P. Merritt and Harry P. Merritt, and by each of them, respectively, on the following grounds:

First. Upon the ground, as alleged by the said defendants, and by each of them respectively, that the bill showed, and shows, that this suit is not a controversy, and does not involve a controversy between citizens of different States, and,
13 therefore, that the suit is not within the jurisdiction of the Court.

Is this ground well taken?

Second. Upon the ground, as alleged by the said defendants, and by each of them respectively, that the pleadings show that the suit is not, and it does not involve, a controversy between citizens of different States, and, therefore, that the Court have, and has, no jurisdiction of the suit.

The answer of the said John A. Stanly and Stephen W. Purington, trustees, is hereby referred to and made part hereof. No replication to said answer was made or filed.

Such being the pleadings, should the said John A. Stanly and Stephen W. Purington, trustees, as regards jurisdiction of the Court, be arranged as parties to the suit on the same side as the parties named as complainants in the bill, and, with the parties so arranged, has this Court jurisdiction of the suit?

Third. Upon the ground as alleged by the said defendants, and by each of them respectively, that the pleadings and the evidence showed that, for the purpose of creating a case cognizable by this Court under the Act of the Congress of the United States prescribing the jurisdiction of this Court, the parties to this suit have been improperly joined as defendants, as follows, namely: John A. Stanly and Stephen W. Purington, as trustees, have been improperly joined as defendants, but were really and truthfully plaintiffs, and should have been, and should be, joined as plaintiffs; that said John A. Stanly and Stephen W. Purington were, at the time of the commencement of this suit, and subsequently, citizens of the State of California, and of the
14 same State as the defendant James P. Merritt, and that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Court.

Is the ground of objection to the jurisdiction of the Court, as alleged by said defendants, and last above stated, well taken? And should this suit be dismissed for want of jurisdiction thereof?

And the facts of the case being as stated above, the following further questions are certified:

Fourth. Have the parties to this suit, for the purpose of creating a case cognizable by this Court under the said Acts of Congress, been collusively joined, as follows: Have the said John A. Stanly and Stephen W. Purington, as trustees, been collusively joined and feigned to be defendants, while, substantially and in truth, plaintiffs, and should they be treated as plaintiffs

and the suit dismissed because not really and substantially involving a dispute or controversy within the jurisdiction of the Court?

Fifth. Has the suit been fraudulently contrived, and instituted and carried on as a fraud upon this Court and upon the jurisdiction thereof, by means of naming and feigning said John A. Stanly and Stephen W. Purington, trustees, citizens of the State of California, to be defendants, while in truth and in fact plaintiffs, claiming the controversy to be between citizens of different States, while in truth between citizens of the same State, and not within the jurisdiction of the Court?

Sixth. Were the said John A. Stanly and Stephen W. Purington, trustees, necessary parties to the suit, whose citizenship was to be considered upon the question whether this suit
15 is a controversy between citizens of different States, and as such within the jurisdiction of the Court?

Seventh. Is this suit a controversy, or does it involve a dispute or controversy, between citizens of different States?

Eighth. Had this Court jurisdiction of this suit?

Ninth. Does the bill state a case within the jurisdiction of the Court?

Tenth. Do the pleadings state a case within the jurisdiction of the Court?

Eleventh. Was the demurrer to said Bill, well taken, and should it have been sustained?

Twelfth. Was the plea to the jurisdiction well taken, and should it have been sustained?

It is ordered that the said question whether this Court had or had not jurisdiction of this suit, be, and the same hereby are certified to the Supreme Court of the United States, for its decision, and that the Clerk of this Court transmit a copy hereof, under the seal of this Court, to the Clerk of the Supreme Court of the United States.

Dated February 19th, 1897.

JOSEPH McKENNA,
Circuit Judge.

Endorsed: No. 11,563. U S. Circuit Court, Ninth Judicial Circuit, Northern District of California. The President and Trustees of Bowdoin College et al. vs. James P. Merritt et al. Certificate of question of jurisdiction to the Supreme Court. Filed and entered Febry. 19th, 1897. W. J. Costigan, Clerk.

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16 **AMENDMENT TO CERTIFICATE OF QUESTION OF JURISDICTION, ETC.**

The above certificate is hereby amended so as to show that on the 12th day of December, 1896, the said James P. Merritt and

Harry P. Merritt gave written notice to the defendants, Thomas Prather, Wm. E. Dargie, George W. Reed, administrator, etc., and O. C. Miller, Exr., etc., and to John A. Stanly, trustee, etc., that they were about to appeal to the Supreme Ct. of the United States, and would on the 16th day of December, 1896, apply to the Circuit Court for an allowance of said appeal, which notice was filed on said 16th day of December, and which is hereby referred to and made part hereof; and that on said 12th day of December said Prather and Dargie and Miller, executor, declined to join in said appeal, which declination is attached to said notice and is hereby referred to and made part hereof; and that on said 12th day of December, Frederick A. Merritt refused in writing to join in said appeal which refusal was filed on the 13th day of January, 1897, and is hereby referred to and made part hereof.

Dated February 24th, 1897.

JOSEPH McKENNA,
Judge of the U. S. Circuit Court.

[Endorsed]: No. 11563. U. S. Circuit Court, Ninth Judicial Circuit, Northern District of California. The President and Trustees of Bowdoin College, et al., vs. James P. Merritt, et al. Amendment to certificate of question of jurisdiction, etc. Filed and entered February 24th, 1897. W. J. Costigan, Clerk.

DECREE.

In the Circuit Court of the United States for the Ninth
17 Circuit and District of Northern California.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE ET ALS., Complainants,
vs.
JAMES P. MERRITT, ET ALS., Defendants.
} In Equity.

This cause came on regularly for final hearing, before Hon. Thomas P. Hawley, presiding at the request and in the place of Hon. Joseph McKenna, upon the issues formed by the original bill and the answer of the defendant James P. Merritt thereto, and the replication to said answer, and the answer of the defendants Stanly and Purrington to said original bill; and also upon the issues formed by the first supplemental bill (designated as the "Corrected Supplemental Bill"), and the answer of the defendant Harry P. Merritt thereto, and the replication to said last mentioned answer; and also upon the issues formed by the Second Supplemental Bill (and the "addendum" thereto), and

the answer to said second supplemental bill and addendum, of Harry P. Merritt, George W. Reed, administrator with the will annexed of Catherine M. Garcelon, deceased, and O. C. Miller, executor of the will of Stephen W. Purrington, deceased, defendants to said second supplemental bill, and upon the replications to said answers of said defendants to said second supplemental bill; and also upon the is-
18 sues formed by the third supplemental bill, and the answer of James P. Merritt thereto, and the replication to said last mentioned answer, and also upon the disclaimers of the defendants Prather and Dargie; and (by the stipulation of all the parties duly filed, and duly approved by the Court) was tried upon the testimony of witnesses examined orally in open Court, and upon certain documentary evidence: and depositions introduced in evidence by the respective parties, and also upon the testimony of Mrs. Ellen S. Gordon, whose testimony was, on account of her ill health, taken at her home by a special examiner appointed by the Court for that purpose, and upon certain facts admitted by stipulation of the parties duly introduced and placed on file; and the said testimony taken orally in open court as aforesaid having been duly taken down, and written out, certified and filed in the cause by the stenographer of the Court, who was agreed upon by the parties and appointed by the Court for that purpose, all in pursuance of and in accordance with the said stipulation of the parties filed and approved as aforesaid; and the defendant Frederick A. Merritt having, since the filing of the original bill compromised the said matter and conveyed to John A. Stanly and Stephen W. Purrington, as trustees under the deed of trust mentioned in said original bill any and all right, title, and interest which he theretofore claimed and pretended to have in and to the trust property, the subject matter of the suit, and consented to a decree against him as prayed for in said original bill; Mr. George N. Williams and Mr. Robert Y. Hayne appearing as counsel for the complainants, and Mr. George R. B. Hayes and Mr. Warren Olney appearing as counsel for the de-
19 fendant Stanly, and Mr. Horace W. Philbrook and Mr. Alfred H. Cohen appearing as counsel for the defendant James P. Merritt, and Mr. Arthur Rodgers appearing as counsel for the defendant Harry P. Merritt, and Mr. Henry C. Campbell appearing as counsel for the defendant O. C. Miller, Executor, etc., and Mr. Emil Nusbaumer appearing as counsel for the defendant Reed, Administrator, etc., and Mr. A. A. Moore and Mr. J. C. Martin appearing as counsel for the defendants Prather and Dargie, and the cause having been argued and submitted to the Court for its decision and decree, and the Court having fully considered the matter, it is now

Ordered, adjudged, decreed and determined that the instru-

ment executed on April 21st, 1891, by Catherine M. Garcelon to Stephen W. Purrington and John A. Stanly, a copy of which is annexed to the original bill, and marked "Exhibit No. 5" thereto, and a copy of which is also annexed to the second supplemental bill, and marked "Exhibit E" thereto, was, at the time of its execution, and is, a good and valid deed of trust, and conveyed to and vested in said John A. Stanly and Stephen W. Purrington, as trustees, the legal title to all and singular the property mentioned and described therein; and that the assignment and transfer or bill of sale of personal property executed by said Catherine M. Garcelon to said Stephen W. Purrington and John A. Stanly at the same time as said deed of trust, and as part of the same transaction (a copy of which assignment and transfer or bill of sale of personal property was by stipulation at the trial added by way of amendment to the original bill and the second supplemental bill), was at the time of its execution, and is, a good and valid assignment and transfer and bill of sale, and conveyed to and vested in said John A. Stanly and Stephen W. Purrington, as trustees, the legal title to all and singular the property mentioned and described therein; and that the declaration of trust executed by said Stanly and Purrington to said Catherine M. Garcelon (which was also signed by said Catherine M. Garcelon) at the same time as said deed of trust and said assignment and transfer or bill of sale, and as part of the same transaction, a copy of which declaration of trust is annexed to said original bill, and marked "Exhibit 6" thereto, and a copy of which is also annexed to said second supplemental bill and marked "Exhibit F" thereto, was and is a valid declaration of trust, and operative according to the tenor thereof; that said instruments were not, nor was any of them, ambulatory or testamentary in character, or in fraud or violation of any provision of the laws of California; that said Catherine M. Garcelon was, at the time of the execution of said instruments, and at all times previous thereto, and at all times subsequent thereto, up to the time of her death, of sound and disposing mind and memory; and that said instruments were not, nor was any of them, executed by reason of or under the undue influence or by the procurement of Stephen W. Purrington or John A. Stanly, or of any person or persons whatsoever, or under or by reason of any undue influence, duress, menace, fraud, or procurement of any person whatsoever; but that said instruments were, and each of them was, the free and voluntary act of said Catherine M. Garcelon, and are, and each of them is, a valid and operative instrument according to the tenor thereof respectively; that said Stanly and Purrington duly accepted said trust, and at once entered into possession of said trust property under said trust deed

and said assignment and transfer or bill of sale of said personal property and for the purposes stated in said de-
21 claration of trust, and so contained up to the death of said Stephen W. Purrington; that ever since the death of said Purrington said John A. Stanly has been, and still is, the sole surviving trustee of said trust, and in the possession and management of all of said trust property (except the parcels of real property which were sold and conveyed to third persons, as set forth in the answer of said Stanly and Purrington, above mentioned); and that neither the said James P. Merritt nor the said Harry P. Merritt, nor the said Frederick A. Merritt, nor the said Thomas Prather, nor the said William E. Dargie, nor the said George W. Reed as administrator with the will annexed of said Catherine M. Garcelon, deceased, or otherwise, nor the said O. C. Miller, as executor of the said Stephen W. Purrington, deceased, or otherwise, has, or ever had, any estate, right, title, or interest in, or lawful claim upon, said trust property or any part thereof; either as heirs or heirs-at-law of said Catherine M. Garcelon, or under or by reason of her last will and testament, or in any capacity, or for any reason, or upon any ground whatsoever; that the claims and pretenses of the said James P. Merritt, and of the said Harry P. Merritt, and of the said O. C. Miller, as Executor of the said Stephen W. Purrington, and the claims and pretenses of the said George W. Reed, as Administrator, with the will annexed of said Catherine M. Garcelon, deceased, are, and always have been, and each of them is, and always has been, invalid and void, and of no force or effect whatever, except as unlawful hindrances and impediments to the execution of said trust; and that the said James P. Merritt, Frederick A. Merritt, Harry P. Merritt, Thomas
22 Prather, William E. Dargie, George W. Reed, administrator with the will annexed of said Catherine M. Garcelon, deceased, and the said O. C. Miller, executor of the will of said Stephen W. Purrington, deceased, and each of them, and their attorneys, agents, servants, successors and assigns, and the attorneys, agents, servants, successors and assigns of each of them, be, and they are, and each of them is, hereby perpetually enjoined, restrained and prohibited from further maintaining or prosecuting any of the actions, suits or legal proceedings heretofore commenced by them, or any of them, as set forth in said first supplemental bill, and in said second supplemental bill, and from commencing, maintaining or prosecuting any kind of action, suit or legal proceeding whatsoever, in any Court whatsoever, for the purpose of in any manner impeding or calling in question the validity of any of said instruments, or the validity of said trust; and from questioning or disputing in any manner the validity of said deed of trust of April 21st, 1891, or of the said assignment, transfer or bill of sale of the same date, or the existence and validity of said trust, and from asserting, setting

up or claiming, in any manner, or in any form, or in any capacity, any right, title or interest in or to said trust property, or any part thereof; and from in any manner hindering, delaying or impeding the execution of said trust according to the tenor of the said instruments creating the same.

And it is further ordered, adjudged, decreed, and determined that the complainants have and recover from the defendants James P. Merritt, Harry P. Merritt, and George W. Reed,
23 administrator with the will annexed of Catherine M. Garcelon, deceased, their, the said complainants', costs of suit. taxed at $398\frac{70}{100}$.

Dated June 18th, 1896.

THOMAS P. HAWLEY,

District Judge, District of Nevada, assigned to hold and holding said Circuit Court.

[Endorsed:] No. 11,563. U. S. Circuit Court, Ninth Circuit, Northern District of California. The President and Trustees of Bowdoin College, et als. *vs.* James P. Merritt, et als. Decree. Filed and entered June 18th, 1896, W. J. Costigan, clerk.

PETITION FOR AN ORDER ALLOWING APPEAL.

24 In the Circuit Court of the United States for the Northern District of California.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE ET AL., Complainants,
vs.
JAMES P. MERRITT ET AL., Defendants.
} No. 11563 in Equity.

The defendants, James P. Merritt and Harry P. Merritt, each conceiving himself aggrieved by the judgment or decrees made and entered on the 18th day of June, 1896, in this suit above entitled, refusing to dismiss the suit and constituting a final judgment or decree on the merits in favor of the complainants, do each hereby appeal from said judgment or decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and they each pray that this appeal be allowed, and that the question of the jurisdiction of the Court and a Transcript of the record, proceedings and papers upon which said judgment or decree was made, duly authenticated, be sent to the Supreme Court of the United States.

Dated December 16, 1896.

HORACE W. PHILBROOK,
Solicitor for Defendant James P. Merritt.
ARTHUR RODGERS.
RODGERS & PATERSON,
Solicitors for Defendant Harry P. Merritt.

25 **ORDER ALLOWING APPEAL.**

And now, to wit, on this 16th day of December, 1896, it is ordered that the foregoing appeal be, and the same is, allowed as prayed. Let the appellants give bond in the sum of five hundred dollars for costs on appeal.

JOSEPH McKENNA,
Circuit Judge.

[Endorsed:] No. 11,563. In the circuit court of the United States for the northern district of California. The President and Trustees of Bowdoin College et al., complainants, *vs.* James P. Merrittt et al., defendants. Petition on appeal and order allowing appeal. Service of the within and receipt of a copy thereof, on the 16th day of December, 1896, is hereby admitted. Blake, Williams & Harrison, solicitors for complainants. Filed December 16, 1896. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk. Horace W. Philbrook, solicitor for appellant James P. Merritt. Rodgers & Paterson, solicitors for appellant Harry P. Merritt.

NOTICE TO AND REFUSAL OF CERTAIN DEFENDANTS TO JOIN IN APPEAL, WITH PROOF OF SERVICE OF SAID NOTICE.

26 In the Circuit Court of the United States for the Northern District of California.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE, ET AL., Complainants,
vs.
JAMES P. MERRITT, ET AL., Defendants.
No. 11563 in Equity.

To the defendants Thomas Prather, Wm. E. Dargie, Geo. W. Reed, as administrator with the will annexed of the estate of Catherine M. Garcelon, deceased, and O. C. Miller as executor of the will of Stephen W. Purington, deceased, and to the respective solicitors of said defendants; also to John A. Stanly, as trustee under and by virtue of a deed of trust alleged in complainants' bill to have been made by Catherine M. Garcelon and bearing date April 21, 1891, and to the solicitors of said John A. Stanly, named as such defendant:

You and each of you are hereby notified that the defendant James P. Merritt and the defendant Harry P. Merritt are about to appeal this suit above entitled to the Supreme Court of the United States from the judgment or decree made and entered

on the 18th day of June, 1896, in this said suit, by the Circuit Court of the United States for the northern district of California, upon the ground of the want of jurisdiction of the case
27 by said circuit court, and fraud upon said jurisdiction.

You and each of you are hereby requested to join with us in our said appeal, or duly to signify your refusal to do so. And you are hereby notified that on the 16th day of December, 1896, at 11 o'clock A. M., at the court-room of said Circuit Court in the city of San Francisco, in said District, we shall apply to a Judge of said Circuit Court that our said appeal be allowed, and that you and each of you, respectively, unless joining in our said appeal, be served and barred of the right of appeal to said Supreme Court.

Yours Respectfully,

HORACE W. PHILBROOK,
Solicitor for defendant James P. Merritt.
ARTHUR RODGERS,
RODGERS & PATERSON,
Solicitors for defendant Harry P. Merritt.

Dated December 12, 1896.

To the said Circuit Court and to the defendants James P. Merritt and Harry P. Merritt, and to the solicitors of said defendants:

In response to the foregoing request and notice, we here certify that we decline to join in the appeal therein mentioned, or in any appeal of this case to the Supreme Court of the United States, and we waive notice. We reserve our right to appeal this said suit from said judgment or decree to the Circuit
28 Court of Appeal of the United States for the Ninth Circuit.

THOMAS PRATHER AND
WM. E. DARGIE,
By JAS. C. MARTIN AND
A. A. MOORE,
Their Solicitors.

GEO. W. REED,
As administrator with the will annexed of the estate of Catherine M. Garcelon, deceased, defendant.

By
His Solicitor.

O. C. MILLER,
As executor of the will of Stephen W. Purington, deceased.
By H. C. CAMPBELL,
His Solicitor.

JOHN A. STANLY,
As trustee under and by virtue of the deed of trust mentioned in

complainant's bill, dated April 21, 1891, and made by Catherine M. Garcelon, defendant.

By

His Solicitor.

Dated December 12, 1896

29 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE ET AL., Complainants,
vs.
JAMES P. MERRITT ET AL., Defendants.
} No. 11,563.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss.*

Daniel M. Key, being duly sworn, deposes and says: That at the time of service hereinafter mentioned, he was over the age of twenty-one years, and not a party to, or interested in the above-entitled action; That on the 15th day of December, 1896, at the City and County of San Francisco, State of California, he personally served on John A. Stanly, as trustee, a copy of "notice to, and refusal of certain defendants to join in appeal" in the above-entitled action, by then and there delivering to and leaving with James Gaffe, a person in charge of the office of said John A. Stanly, the said copy of said notice.

DANIEL M. KEY.

Subscribed and sworn to before me this 16th day of December, 1896.

[SEAL]. CHAS. E. KELLY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed:] Due service of the within notice and receipt of a copy thereof, and the sufficiency of said notice, on this 12th day of December, 1896, is hereby admitted. E. Nusbaumer,

30 solicitor for the defendant Geo. W. Reed, as admr., etc. with the will annexed of Catherine M. Garcelon, dec'd. No. 11,563. In the Circuit Court of the United States for the Northern District of California. The President and Trustees of Bowdoin College et al., Complainants, *vs.* James P. Merritt et al., Defendants. Notice to and refusal of certain Defendants to join in appeal. Filed December 16, 1896, W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

At a stated term, to wit: the November term, A. D.

31 1896, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City

and County of San Francisco, on Wednesday the 16th day of December, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Joseph McKenna, Circuit Judge.

PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE, ET AL.,
vs.
JAMES P. MERRITT, ET AL. — No. 11563.

MINUTE ORDER ALLOWING APPEAL.

Upon motion of Horace W. Philbrook, Esq., Solicitor for defendant, James P. Merritt, and upon filing a petition of James P. and Harry P. Merritt for an appeal, and an assignment of errors, it is ordered that an appeal be and hereby is allowed to the Supreme Court of the United States as prayed; and it is further ordered that the amount of the bond for costs on said appeal be and hereby is fixed at the sum of Five Hundred Dollars.

ASSIGNMENT OF ERRORS ON APPEAL.

32 In the Circuit Court of the United States for the Northern District of California.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE ET AL., Complainants,
vs.
JAMES P. MERRITT ET AL., Defendants. — No. 11563 in Equity.

And now on the 16th day of December, 1896, comes the said defendant, James P. Merritt, by Horace W. Philbrook, his solicitor, and also the defendant, Harry P. Merritt, by Rodgers & Paterson, and Arthur Rodgers, his solicitors, and each says that the judgment or decree in this suit made and entered on the 18th day of June, 1896, refusing to dismiss the suit and constituting a final judgment or decree on the merits in favor of the complainants, is erroneous and against the just rights of said defendants, and of each of them, respectively, for the following reasons:

First. Because the bill of complaint showed that this suit is not a controversy, and does not involve a controversy between citizens of different States, and is not within the jurisdiction of said Circuit Court.

Second. Because the bill of complaint showed that this suit

does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.

Third. Because the pleadings showed that this suit is
33 not a controversy and does not involve a controversy between citizens of different states and is not within the jurisdiction of said Circuit Court.

Fourth. Because the pleadings showed that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.

Fifth. Because the pleadings and the evidence showed that, for the purpose of creating a case cognizable by said Circuit Court, under the Act of Congress of the United States, enacted March 3, 1875, entitled "An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of Causes from State Courts, and for Other Purposes," and the Acts of Congress amendatory thereof, the parties to this suit have been improperly joined as defendants, as follows, namely, John A. Stanly and Stephen W. Purington as trustees under and by virtue of the deed of trust averred in said bill of complaint to have been made by the late Catherine M. Garcelon and bearing date April 21, 1891, have been improperly joined as defendants, but were really and truthfully plaintiffs, and should have been and should be joined as plaintiffs; that said Stephen W. Purrington as such trustee was really a plaintiff in this suit from its commencement until his death; that said John A. Stanly as such trustee has been ever since the beginning of this suit, and now is, a plaintiff in this suit; that said John A. Stanly was at the time of the commencement of this suit, and ever has been, a citizen of the State of California, and of the
34 same State as said defendant James P. Merritt; that said Stephen W. Purrington was until his death a citizen of the State of California; and that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.

Sixth. Because the pleadings and evidence showed that for the purpose of creating a case cognizable by said Circuit Court, under said Acts of Congress, parties to the suit have been collusively joined, as follows: John A. Stanly and Stephen W. Purington, as trustees, as aforesaid, have been collusively joined as defendants, but at the time of the commencement of this suit, and ever thereafter were really and truthfully plaintiffs; that said Stephen W. Purington, as such trustee, was really a plaintiff in this suit from its commencement until his death; that said John A. Stanly, as such trustee, has ever since the beginning of this suit been, and now is, really a plaintiff; that said Stephen W. Purington was, until his death, a citizen of the State of California, and that John A. Stanly, at the time of the commencement of this suit, was, ever since has been, and now

is, a plaintiff in this suit; both said Stephen W. Purington and John A. Stanly being citizens of the same State as said defendant James P. Merritt.

Seventh. Because the pleadings and evidence showed that this suit was fraudulently devised and procured to be instituted by said John A. Stanly as a fraud upon said Circuit Court and upon the jurisdiction thereof, and that by the fraud and collusion of said John A. Stanly, said Stephen W. Purington, and complainant, The President and Trustees of Bowdoin College, this suit was by them, as co-complainants commenced
35 and was by them as co-complainants collusively and fraudulently prosecuted until the death of said Stephen W. Purington, and ever since the death of said Stephen W. Purington, by said John A. Stanley, and the President and Trustees of Bowdoin College; and that said John A. Stanly and Stephen W. Purington, as trustees as aforesaid, have been, by the fraud and collusion of said John A. Stanly and Stephen W. Purington, and the President and Trustees of Bowdoin College, fraudulently, collusively and falsely named and feigned to be defendants in this suit for the purpose of creating a case cognizable by said Circuit Court under said Acts of Congress.

Eighth. Because the pleadings and the evidence showed that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.

Ninth. Because the pleadings and the evidence showed that this suit is a controversy between the defendants John A. Stanly and Stephen W. Purington (until his death), as trustees as aforesaid, in the names of the persons named in said bill of complaint as complainants, on the one side, and said defendant James P. Merritt, as well as other defendants, on the other side; and that said John A. Stanly and said Stephen W. Purington, now deceased (until his death), and said defendant James P. Merritt are, and at all times were, citizens of the State of California; that the suit is a controversy between citizens of the same State, and that said Circuit Court has no jurisdiction of the controversy.

Tenth. Because the pleadings and the evidence showed
36 that John A. Stanly, as trustee under and by virtue of said deed of trust, named in the bill as a defendant, is really a complainant, and that his interest is identical with complainants, and that his duty is entirely to them, and that all of his acts and those of said Stephen W. Purington, his former co-trustee (now deceased), have been cooperative on the side of the complainants, and that he and his said co-trustee affected and feigned to decline bringing suit in their own names for the purpose of deducing complainant the President and Trustees of Bowdoin College, and the other persons named in said bill of

complaint as complainants, to bring suit in said Circuit Court, and not in a superior court of the State of California, and to make said Stanly and Purington, as trustees as aforesaid, parties defendant on the face of said bill of complaint, and advised and induced and procured this suit to be brought and maintained; that said Stanly and Purington, as trustees as aforesaid, and said The President and Trustees of Bowdoin College, improperly and collusively and fraudulently, and without authority therefor, inserted as complainants the names of all the other nominal complainants in said bill of complaint only because said other nominal complainants were citizens of other States than the State of California, all for the purpose of creating a case cognizable by said Circuit Court.

Eleventh. Because the pleadings and the evidence showed that this suit has been collusively imposed upon the jurisdiction of said Circuit Court by the persons named in said bill of complaint as complainants, and by said John A. Stanly, as trustee as aforesaid.

Wherefore, the said defendant, James P. Merritt, and
37 also the said defendant, Harry P. Merritt, do each pray that the said judgment or decree be reversed and that the said Circuit Court be directed to enter a decree dismissing this suit for want of jurisdiction, and awarding to each of these said defendants, respectivery, the recovery of his costs incurred.

HORACE W. PHILBROOK,
Solicitor for Defendant, James P. Merritt.
ARTHUR RODGERS, RODGERS & PATERSON,
Solicitors for Defendant, Harry P. Merritt.

Dated December 16, 1896.
[Endorsed]. No. 11,563.

In the Circuit Court of the United States for the Northern District of California. The President and Trustees of Bowdoin College, *et al.*, Complainants, *vs.* James P.Morritt, *et al.*, Defendants. Assignment of Errors on Appeal. Service of the within and receipt of a copy thereof on the 16th day of December, 1896, is hereby admitted. Blake, Williams & Harrison, Solicitors for Complainants. Filed December 16, 1896, W. J. Costigan, Clerk, by W. B. Beaizley, Deputy Clerk.

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38 **CITATION AND PROOF OF SERVICE**

UNITED STATES OF AMERICA, *ss:*
To the President and Trustees of Bowdoin College, a corporation; Nathaniel G. Garcelon, M. Jefferson Garcelon, Octavia D. Garcelon, Alice M. Garcelon, Mary Dunbar, Hannah Farr,

Charles E. Garcelon, Mary C. Gilman, Joanna F. Gould, Sarah T. Haley, Rose J. Swain, Susan Purinton, May Haley, May I. Dalton, Lillian Purinton, Nathaniel Purinton, William Purinton, Augustus Brown, Ella Brown, Kate M. Lunt, Albert Otis, Helen Otis, Alice Otis, Carrie Otis, Albion C. Merritt, Chas. A. Merritt, Catherine M. Noyes, James W. Cone, John Alexander, Mariana Nowell (mispelled Gowell), Haley Alexander, Franklin Alexander, Alice Dyer Otis, Isabella S. Haskell, William Haskell, Ruth Purinton, May Smith, Minnie Smith, Catherine Smith, Helen Smith, Charles Smith, Samuel M. Smith, Harriet Small, Stephen Purinton, Caroline Purinton, Woodbury Purinton, Henry S. Merritt, Alice Smith, Mrs. Charles Purinton, Ralph Purinton and Renaldo Purinton, suing in behalf of themselves and of other beneficiaries of the trust deed alleged to have been made and executed by the late Catherine M. Garcelon to John M. Stanly and Stephen W. Purinton. To all parties complainant in that certain suit in the Circuit Court of the United States for the Northern District of California, wherein the foregoing named persons are named as complainants, and James P. Merritt and others are defendants, Greeting:

YOU ARE HEREBY NOTIFIED that in a certain cause in equity in the Circuit Court of the United States for the northern district of California, wherein the persons above named are complainants and James P. Merritt, Frederick A. Merritt,
39 Thomas Prather, William E. Dargie, Harry P. Merritt, George W. Reed as administrator with the will annexed of the estate of Catherine M. Garcelon, deceased, and O. C. Miller as executor of the will of Stephen W. Purrington, deceased, are defendants, and John A. Stanly as a trustee is also named as a defendant, the defendants therein James P. Merritt and Harry P. Merritt have prayed an appeal to the Supreme Court of the United States from the decree in said cause entered, and that such appeal has been allowed.

WHEREFORE, you are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the 19th day of February, 1897, to show cause, if any there be, why the decree appealed from should not be reversed and set aside, and relief be granted to said appellants as by them prayed, and as to justice and equity may appertain.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of December, 1896.

JOSEPH McKENNA,
Circuit Judge.

In the Circuit Court of the United States, for the Northern District of California, Ninth Circuit.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE, Complainants,

40 *vs.*

JAMES P. MERRITT ET AL., Defendants.

State of California, City and County of San Francisco, } ss.

Daniel M. Key, being first duly sworn, deposes and says: That at all the times herein mentioned he was, and is, a citizen of the United States and of the State of California, over the age of twenty-one years, and not a party to or interested in the above entitled suit; that on the 16th day of February, 1897, in the City of Oakland, County of Alameda, State of California, between the hours of three and five o'clock in the afternoon, he personally served the annexed citation in said suit upon John A. Stanly, who as trustee is one of the parties to said suit, by then and there exhibiting to said John A. Stanly, personally, the said citation, and delivering to him personally a copy thereof.

Affiant further deposes that George R. B. Hayes, Esq., who was in said suit the solicitor of record of said John A. Stanly as a party therein as aforesaid, died prior to the month of September, 1896, and that no solicitor or attorney has been substituted in his place.

DANIEL M. KEY.

Subscribed and sworn to before me this 18th day of February, 1897.

[SEAL.] GEO. T. KNOX,
Notary Public in and for the City and County of San Francisco, State of California.

41 [Endorsed:] No. 11563. In the Circuit Court of the United States for the Northern District of California. The President and Trustees of Bowdoin College et al., complainants, *vs.* James P. Merritt et al., defendants. Citation and proof of service. Service of the within citation upon the complainants in the suit therein mentioned, and a receipt of a copy thereof by said complainants, in the City of San Francisco, State of California, on this 6th day of January, 1897, is hereby admitted. Service of appellants' bond on appeal is also admitted. Blake, Williams & Harrison, solicitors for said complainants. Filed February 18th, 1897. W. J. Costigan, clerk.

AUTHENTICATION OF THE FOREGOING DOCUMENTS.

42 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE, ET AL., Complainants,
vs.
JAMES P. MERRITT ET AL., Defendants. } No. 11,563.

I, W. J. Costigan, clerk of the Circuit Court of the United States, in and for the Northern District of California, do hereby certify the foregoing to be full, true and correct copies of the original Certificate of the Question of Jurisdiction to the Supreme Court of the United States, filed and entered February 19, 1897; The Amendment to the Certificate of the Question of Jurisdiction, filed and entered February 24, 1897; the Final Decree, filed and entered June 18, 1896; the Petition of James P. Merritt and Harry P. Merritt for Appeal, with signed order allowing appeal annexed, filed December 16, 1896; the notice to, and refusal of defendants Thomas Prather et al., to join in appeal, with proof of service annexed, filed December 16, 1896; the Minute Order Allowing Appeal, entered December 16, 1896; the Assignment of Errors on Appeal, filed December 16, 1896; and the Citation, with proof of service annexed, filed February 18, 1897, as the same, and each thereof, now remain on file and of record in my office in the above entitled cause. That the same constitute a full and complete exemplication of the above mentioned documents and orders in the said cause, and of the whole thereof.

43 ALL OF WHICH I have caused to be exemplified according to the Act of Congress.

In witness whereof, I have hereunto set my hand and affixed the Seal of said Court, this 29th day of March, A. D. 1897.

[SEAL.] W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern District of California.

I, William W. Morrow, Judge of the District Court of the United States, for the Northern District of California, holding Circuit Court of the United States for the Northern District of California, do hereby certify that said Circuit Court is a Court of Record, having a Clerk and Seal. That W. J. Costigan, who has signed the annexed attestation, is the duly appointed and qualified Clerk of said Court, and was said Clerk at the time of signing said attestation. That said signature is his genuine handwriting, and that all his official acts, as such Clerk, are entitled to full faith and credit.

AND I FURTHER CERTIFY that said attestation is in due form of law.

WITNESS MY HAND this 29th day of March, A. D. 1897.

W. W. MORROW,

Judge U. S. District Court, Northern District of California, holding Circuit Court of the United States for the Northern District of California.

UNITED STATES OF AMERICA,)
44 *Northern District of California.*) ss.

I, W. J. Costigan, clerk of the Circuit Court of the United States for the Northern District of California, do hereby certify that the Honorable WILLIAM W. MORROW, whose name is subscribed to the preceding certificate, is the judge of the District Court of the United States for the Northern District of California, duly appointed and qualified, holding Circuit Court of the United States for the Northern District of California, and that the signature of said judge to said Certificate is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the Seal of the said Circuit Court, this 29thday of March, A. D. 1897.

[SEAL.] W. J. COSTIGAN,

Clerk U. S. Circuit Court, Northern District of California.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
CLERK

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IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

JAMES P. MERRITT ET AL.,
APPELLANTS,

vs.

THE PRESIDENT AND TRUSTEES
OF BOWDOIN COLLEGE ET AL.,
APPELLEES.

} IN EQUITY.

BRIEF UPON MOTION TO DISMISS APPEAL.

BLAKE, WILLIAMS & HARRISON,
GEORGE N. WILLIAMS,
Solicitors for Appellees.

THOMAS H. HUBBARD,
E. S. PILLSBURY,
GEORGE N. WILLIAMS AND
ROBERT Y. HAYNE,
Of Counsel for Appellees.

Supreme Court of the United States

JAMES P. MERRITT Et Al.,

Appellants,

vs.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE Et Als.,

Appellees.

THE MOTION.

And now come The President and Trustees of Bowdoin College et als., complainants in the Court below, and appellees in the above entitled Court, by their counsel, Thomas H. Hubbard, Esq., George N. Williams, Esq., E. S. Pillsbury, Esq., and Robert Y. Hayne, Esq., in pursuance of their notice of motion heretofore given, and move to dismiss the appeal taken by James P. Merritt and Harry P. Merritt from the final decree in said cause upon the following grounds, viz:

(1). That no certificate of jurisdiction, or anything equivalent thereto, was ever granted or made by the Judge by whom the demurrer to the bill was heard and decided, and by whom the cause was

tried and the decree appealed from made, viz., the Hon. Thomas P. Hawley; and that no application for any such certificate, or any equivalent thereto, was ever made to said Judge Hawley; and that Judge McKenna, who did not hear the cause, had no power or authority to grant or make any certificate of jurisdiction;

(2). That no certificate was made by Judge McKenna during the term at which he passed upon the pleas to the jurisdiction and the motion to dismiss for want of jurisdiction, or for nearly three years thereafter;

(3). That no certificate of jurisdiction, or anything equivalent thereto, was granted, made or applied for during the term of the Court at which the decree appealed from was made, entered and enrolled, or for a long time thereafter.

THE FACTS.

The certificate signed by Judge McKenna, long after the entry of the final decree by Judge Hawley, shows the following facts:

The question of jurisdiction of the suit by the Court "was raised and litigated by demurrer to the bill, by pleas and by motions to dismiss the suit for want of jurisdiction thereof by the Court" (See folio 4). The demurrer was overruled by Judge Hawley (See 54 Fed., 55). The pleas and

motions to dismiss were overruled by Judge McKenna on July 23rd, 1894 (See 63 Fed., 216). Nearly two years afterwards a final decree in favor of complainants was made by Judge Hawley. (See 75 Fed., 480). This decree was "on the 18th day of June, 1896, signed by said Hon. Thomas P. Hawley, Judge, and entered and enrolled. *After the entry and enrollment of said final decree nothing whatever was done by the defendants, or either of them, until the 16th day of December, 1896*" (See folio 10).

On the 16th day of December, 1896, said James P. Merritt and Harry P. Merritt filed in said Court their petition of appeal to the Supreme Court of the United States, and their assignment of errors on said appeal; and on the same day Judge McKenna made an order allowing said appeal. It appears from an amendment to the certificate that certain papers in connection with the application for the appeal were filed on the 14th day of December, so that the statement that nothing was done until the 16th of December is a shade inaccurate. But the slight difference in date is entirely immaterial. The citation was issued on December 24th, 1896 (Copies of these papers are presented on this motion. See folio 24 ,*et seq*).

"On the 25th day of January, 1897, counsel for the said James P. Merritt, and counsel for the said Harry P. Merritt, applied to the Court for a

certificate of the question of jurisdiction as asked for in said petition of appeal. The Court directed notice to opposing counsel to be given, which was done. The counsel for complainants appeared specially on said application for the purpose of opposing the granting of any certificate, on the ground that none had been applied for during the term at which the judgment was rendered, and for no other purpose, and reserved their objections to the giving of said certificate upon the grounds aforesaid" (See fol. 11-12).

"On the said 30th day of January, 1897, the Court after hearing the objections of counsel for the complainants to the givingof any certificate, grants this certificate, to which action of the Court counsel for complainants except. And thereafter counsel for complainants, reserving the said objections, proposed amendments to this certificate, some of which amendments were, after argument, allowed and inserted" (See fol. 12).

The data as to the terms of the Court are as follows, viz.:

An Act of Congress, passed May 25th, 1896, (~~a copy of which is annexed hereto~~) provides that the terms of this Circuit Court shall begin "on the first Monday in March, the second Monday in July, and the first Monday in November." The Judges (as we are informed) had some doubt as to the effect of this Act upon the then existing term, and on May 26th, 1896, out of abundance of caution, called a special session of the Court for June 12th, 1896. "Said special session was continued by regular adjourument of the Court, from day to day, until and including the 10th day of July, 1896, when the Court adjourned *sine die*" (Fol. 12).

This adjournment *sine die* ended whatever term then existed whether general or special. "The next regular term of the Court was opened on July 13th, 1896, and continued until and including October 30th, 1896; and on November 2nd, 1896, the present November term was commenced" (See folio 12).

As already stated nothing whatever was done from the time of the entry and enrollment of the final decree on June 18th, 1896, until about the middle of the following December, when steps to obtain the allowance of an appeal were taken. No certificate of jurisdiction was applied for until January 25th, 1897.

POINTS AND AUTHORITIES.

1.

Upon the foregoing facts we submit in the first place whether the certificate ought not to have been made by Judge Hawley instead of Judge McKenna, and in the second place, whether if Judge McKenna had any power to make the certificate it ought not to have been made by him during the term at which his decision upon the plea was made (See 63 Fed., 213), which was nearly two years before the entry of the final decree. It would seem that if the certificate may be made by a Judge whose only connection with the case was in passing upon prelimi-

nary matters he ought to be called upon to do so while the facts as to such matters are fresh in his memory.

II.

If the certificate could be made by a different Judge from the one who made the decree appealed from, it ought at least to have been made during the term at which said decree was entered and enrolled; and as that was not done in this case the appeal should be dismissed.

The only questions arising on the appeal relate to the jurisdiction of the above Circuit Court (See Assignment of Errors, folio 32). Such questions can be presented only by a certificate.

Maynard vs. *Hecht*, 151 U. S. 324.

And such certificate can be made only during the term at which the decree appealed from was entered. If made afterwards it is unavailing.

The Bayonne, 139 U. S., 692.

Colvin vs. *Jacksonville*, 158 U. S., 456.

This is a sound and wholesome rule. For it may be difficult, and in many cases impossible, for the Judge to make the certificate properly if it be not applied for until after the facts have passed from his memory. Furthermore, if delays are permitted the only judges who know about the facts may die or resign. All the analogies of the law in relation

to the effect of the adjournment of the term are in favor of the rule. Nor can inconvenience arise where cases are decided near the end of the term. For the jurisdiction can always be saved by the proper order.

In some cases questions have been raised as to whether other procedings might not take the place of and be equivalent to a certificate of jurisdiction. But such questions are immaterial here ; because *nothing* subsequent to the final decree was done during the term at which said decree was entered and enrolled nor during the succeeding term. It was not until after one term had intervened, and a subsequent one had commenced, viz., in December, 1896, that any steps *whatever* were taken. Then steps were taken looking to an allowance of an appeal, and an assignment of errors filed, and order allowing an appeal made, and citation issued. It is manifest that if such steps could in any event be regarded as the equivalent of a certificate of jurisdiction they would be subject to the same objections as are made to the certificate, viz., they were too late.

The making of a certificate, or of some equivalent thereto (if such a thing could be) being jurisdictional, it was not necessary for the appellees to reserve any objection in the Court below. But as shown by the certificate, the appellees (out of abundance of caution) reserved the objections, appearing specially for that purpose only.

III.

The above points arise on the papers which we present upon this motion. It is true that the certificate of jurisdiction refers to certain documents which are neither set out therein nor presented to the Court upon this motion, and that the appellants have not yet filed their record on appeal. But such of the documents referred to in the certificates as are not presented on this motion, are immaterial to the disposition of the motion. We are not now concerned with the question whether the certificate shows that the Circuit Court had or had not jurisdiction. If we were, the omitted documents might be material. But we are concerned only with the question whether the certificate was or was not in time. And everything necessary to the determination of that question is presented. For the certificate itself shows the necessary dates of the various proceedings, and the data as to the terms of the Court, the fact that nothing was done after the entry of the final decree until long after the adjournment of the term, nor indeed, until after the adjourment of the succeeding term; and we have presented the papers relating to the taking and scope of the appeal. What more can be necessary?

We may add that the papers referred to in the certificate probably constitute several thousand

folios, and to have presented them all would have been to incur a great, and to our minds, a needless expense.

If however, the Court should consider the papers presented as an insufficient basis for our motion we ask leave to renew it at a subsequent period. We may state in addition that there are certain other objections to the appellant's proceedings which will not appear until the complete record is filed, and which we will with the permission of the Court, reserve until the appellants shall have complied with that requirement.

Respectfully submitted,

BLAKE, WILLIAMS & HARRISON,

GEORGE N. WILLIAMS,

Solicitors for Appellees.

THOMAS H. HUBBARD,

E. S. PILLSBURY,

ROBERT Y. HAYNE,

Of Counsel.

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IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

JAMES P. MERRITT ET AL.,
APPELLANTS,
vs.
THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE ET AL.,
APPELLEES.
IN EQUITY.

BRIEF OF THE APPELLANTS UPON THE MOTION TO DISMISS THE APPEAL.

CHAS. H. LOVELL,
Counsel for Appellants.

HORACE W. PHILBROOK,
Solicitor for Appellant James P. Merritt.

ARTHUR RODGERS,
RODGERS & PATERSON,
Solicitors for Appellant Harry P. Merritt.

J. C. MARTIN,
A. A. MOORE,
E. NUSBAUMER,
Of Counsel for Appellants.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

JAMES P. MERRITT, ET AL.,
Appellants,

vs.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE, ET AL.,
Appellees.

Brief of the Appellants, upon the Motion to Dismiss the Appeal.

THE FACTS.

The part of the record printed by the appellees, in support of their motion to dismiss the appeal, presents but a small part of the material

facts. We have printed for the convenience of the Court, and file herewith, other parts of the record. From the parts of the record so furnished by the appellees, and the additional parts of the record so produced by us, the facts are shown to be as follows:

The appeal is from the Circuit Court for the Northern District of California.

The suit is a bill in equity to quiet title to property of the value of one and a quarter million dollars. The subject matter of the suit is an alleged trust conveyance, made by one Catherine M. Garcelon to John A. Stanly and Stephen W. Purington, citizens of the State of California, as trustees, in trust to hold the property for a certain number of years, and then to convert it into money, and distribute it among certain beneficiaries. Many of the beneficiaries are citizens of the State of California, and many of them, including The President and Trustees of Bowdoin College, are citizens of other States.

The suit was brought in the Circuit Court, upon the sole ground of a controversy between citizens of different States.

The beneficiaries of the alleged trust designated as complainants in the title of the bill are citizens of other States than

California. Most of the other beneficiaries are therein alleged to be citizens of California. No reason is alleged for omitting the California beneficiaries as parties to the suit. The defendants are alleged in the bill to be citizens of California. The trustees, Stanly and Purington are also alleged in the bill to be citizens of California, and in the title to the bill are named as defendants; but it is apparent from the bill that the trustees, Stanly and Purington, are really plaintiffs and that they are *named* in the bill as defendants only to make the formal appearance of a controversy between citizens of different States.

The bill was filed Feb. 23, 1892. On May 14, 1892, and in due time, the defendant, James P. Merritt, filed a demurrer to the bill, duly specifying as one of its grounds, "That this Court has no jurisdiction of this suit." This demurrer was overruled on Feb. 3, 1893 by the Circuit Court, by Hon. Thomas P. Hawley, sitting as Circuit Judge. Thereafter, on April 1, 1893, and in due time, the same defendant filed an answer to the bill, setting up as one of its grounds, that the Court was without jurisdiction of the suit, and that the defendants, Stanly and Purington, the trustees, were in fact plaintiffs,

and had been named as defendants, improperly, fraudulently and collusively, so as falsely to make out a case for the jurisdiction of the Federal Court. Subsequently, on May 5, 1893, and in due time, the same defendant filed a plea to the jurisdiction, on the same grounds as those stated in his answer as already mentioned. The question of the sufficiency of the plea so filed, was litigated in the Circuit Court, with the result that the Court, by Hon. Joseph McKenna, as Circuit Judge, made an order in the suit, on July 10, 1893, holding the plea sufficient; and, at the same time, filed an opinion in writing, *which is itself a certificate of the question of jurisdiction.*

The complainants filed replication to the answer, and also to the plea.

Subsequently, on Nov. 27, 1893, the complainants filed a supplemental bill, the sole purpose and effect of which was to bring in Harry P. Merritt as an additional co-defendant.

This appeal is taken by the defendants, James P. Merritt and Harry P. Merritt.

In due time, Harry P. Merritt, thus brought in as a co-defendant, filed a demurrer to the original bill, and also a demurrer to the supplemental bill adding him as a party defendant,

alleging in each demurrer: "That this Court has no jurisdiction of this suit." These demurrers of Harry P. Merritt were overruled by the Court by Judge McKenna, the Circuit Judge on Jan. 2, 1895.

The plea of James P. Merritt to the jurisdiction was heard in the Circuit Court by Judge McKenna as Circuit Judge, and at the same time, and along with the plea the same defendant and also the defendant Harry P. Merritt, moved the Court to dismiss the suit, for want of jurisdiction thereof; and on the further ground that it was a fraudulent imposition upon the jurisdiction of the Court. On July 23, 1894, the said plea of James P. Merritt to the jurisdiction, and the said motions to dismiss, were all denied by the Circuit Court, Hon. Joseph McKenna presiding. And thereupon, and on the same day, namely: on July 23, 1894, the Circuit Court, by Judge McKenna as Circuit Judge, filed in the Court, in writing, an opinion, stating the grounds for overruling the said plea, and the said motions to dismiss the suit. This opinion, so filed, is a part of the record on appeal, sent to this Court, *and is in itself, as complete a certificate of the question of jurisdiction, as was the certificate held by the Supreme Court to be*

sufficient in the case of Colvin vs. Jacksonville, 158 U. S. 458-459.

Thereafter, and in due time, the defendant, Harry P. Merritt, also filed an answer to the bill, setting up as one of the grounds the same objections to the jurisdiciion of the Court as those stated in his demurrer and also in the plea and motions above mentioned. Afterward, the case was heard in the Circuit Court, Hon. Thomas P. Hawley sitting as Circuit Judge, upon the issues raised by the bill, the supplemental bill, and the answers, above mentioned, and a final decree was rendered for the Complainants. In rendering the final decree, Judge Hawley filed in the suit, an opinion in writing, in which he referred to the second opinion theretofore filed by Judge McKenna, and mentioned above, saying:

"The views that have been heretofore expressed, and the principles of law *that have been discussed and decided by this Court*, in the case (54 Fed. 55; 59 Fed. 6; 63 Fed. 213) will not be considered, commented upon or reviewed."

Of this language, the expression "63 Fed. 213" was a reference to the said opinion, previously filed by Judge McKenna on July 23, 1894.

The final decree for the Complainants, was entered in the Circuit Court on June 18, 1896.

Within six months thereafter, namely, on Dec. 16, 1896, the defendants, James P. Merritt and Harry P. Merritt, presented to and filed in the Circuit Court, their petition on appeal to the Supreme Court, and therewith an assignment of errors. The assignment of errors so filed consists solely of specifications upon the question of jurisdiction of the Circuit Court, and the petition on appeal states in express words that the appeal is taken "for the reasons specified in the assignment of errors, which is filed herewith." The petition on appeal also says that the Appellants "each pray that this appeal be allowed, and that *the question of the jurisdiction of the Court*, and a transcript of the record, proceedings and papers * * * duly authenticated, be sent to the Supreme Court of the United States."

Upon the filing of said petition on appeal, the Circuit Court, on the same day, made its order stating: "It is ordered that the foregoing appeal be and the same is *allowed as prayed for*."

As already mentioned, the petition on appeal expressly asked "that the question of the jurisdiction of the Court * * * duly authenti-

cated, be sent to the Supreme Court of the United States." The Circuit Court did not immediately draw up any other certificate of the question of jurisdiction than such as was contained in the order allowing the appeal "as prayed for." But afterwards, and at the same term of the Circuit Court in which the petition on appeal was filed, the Circuit Court, by Hon. Joseph McKenna as Circuit Judge, did make a formal and elaborate certificate of the question of jurisdiction, shown in the part of the record furnished by the Appellees on this motion.

The Points and Authorities.

I.

In the notice of a motion to be made on May 3, 1897, to dismiss the appeal, and in the brief served in support of the motion, three grounds are stated. In answering the third of the alleged grounds, we shall also meet the other two. We therefore first answer the third alleged ground, which is:

"(3). That no certificate of jurisdiction or anything equivalent thereto, was granted, made or applied for during the term of the Court at which the decree appealed from was made, entered and enrolled, or for a long time thereafter."

To any such ground for the motion, there are four answers, every one of which is by itself absolutely conclusive, namely:

1. The certificate of the question of jurisdiction may lawfully be made after the expiration of the term of Court at which the decree appealed from was given, and in the case here the formal certificate made after the expiration of such term was made in due time;

2. The order allowing the appeal is itself a sufficient certificate of the question of jurisdiction;

3. A proper and sufficient certificate of the question of jurisdiction was made before the expiration of such term; and

4. The case is one wherein a certificate of the question of jurisdiction of the Circuit Court, is superfluous and therefore not requisite to the right of appeal to the Supreme Court.

I.

The Certificate of the Question of Jurisdiction may Lawfully be made after Expiration of the Term of Court at which the Decree Appealed from was Given, and in the Case Here the Certificate made

after the Expiration of such Term was made within Due Time.

The Act of Congress which gives the appellate jurisdiction of this suit is the Act of March 3, 1891, (26 Statutes at Large pp. 826, 827), and the language is:

"*Be it enacted* etc.

* * * * * * * * *

"SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court for decision."

The time within which such appeal "*may be taken*" is defined by Sec. 1008 of the U. S. Revised Statutes, which is:

"SEC. 1008. No judgment, decree or order of a Circuit or District Court in any civil action at law or in equity, shall be reviewed in the Supreme Court, unless the writ of error is brought, or the appeal is taken within two years after the entry of such judgment, decree or order."

The Act of March 3, 1891, in the provision just quoted, does say that "the question of jurisdiction alone shall be certified to the Supreme Court for decision." At what time may such certificate be made? If we are to make sure of the inten-

tion of Congress on this point, we must compare the language of the Act of March 3, 1891, (just quoted) with the language of the same Legislature, which provided for appeals to the Supreme Court upon certificates of division of opinion, namely, Sections 651, 652, 693 and 697 of the Revised Statutes. That language was as follows:

"SEC. 651. Whenever any question occurs on the trial or hearing of any criminal proceeding, before a Circuit Court upon which the judges are divided in opinion, the point upon which they disagree shall, *during the same term*, upon the request of either party, or of their counsel, be stated under the direction of the judges, and certified under the seal of the Court, to the Supreme Court at their next session." * *

"SEC. 652. When a final judgment or decree is entered in any civil suit or proceeding before any Circuit Court held by a circuit justice and a circuit judge, or a district judge, or by a circuit judge and a district judge, in the trial or hearing whereof any question has occurred upon which the opinions of the judges were opposed, the point upon which they so disagreed shall, *during the same term*, be stated under the direction of the judges and certified, and such certificate shall be entered of record. * *

"SEC. 693. Any final judgment or decree in any civil suit or proceeding before a Circuit Court which was held, at the time, by a circuit justice and a circuit judge or a district judge, or by the circuit judge and a district judge, wherein the said judges certify *as provided by law* that their opinions were opposed upon any question which occurred on the trial or hearing of the said suit or proceeding, may be reviewed and affirmed, or reversed or modified, by the Supreme Court, on writ of error or appeal. * *

"SEC. 697. When any question occurs on the hearing or trial of any criminal proceeding before a Circuit Court, upon which the judges are divided in opinion, *and the point upon which they disagree is certified to the Supreme Court according to law*, such point shall be finally decided by the Supreme Court." * *

It is to be observed that in these provisions for appeals upon certificates of divisions of opinion, the legislature inserted in the statute (Rev. Stats. §§ 651, 652 just quoted) the *express* words "during the same term," saying *expressly* that the certificate had to be made "during the same term" as the "final judgment or decree" to be appealed from. And the statute also *expressly* gave the right of appeal only in cases (§ 693) "wherein the said judges certify *as provided by law*," *i. e.*, "during the same term," and (§ 697) when "the point upon which they disagree is certified to the Supreme Court *according to law*," *i. e.*, "during the same term." From such use of the express words "during the same term" and the express limitation of the right of appeal to cases where the certificate had been made "*as provided by law*," and "*according to law*," *i. e.*, "during the same term," it follows that if the words "during the same term" had not been used, the making of the certificate "during the same term" as the final judgment or decree, could not have been required.

In *Platt* vs. *Union Pac. R. R. Co.*, 99 U. S. 58, this Court decided the meaning of the words "disposed of" in the phrase "sold or disposed of,"

used in an Act of Congress, and said:

"Congress is not presumed to have used words for no purpose. If it was intended that no lands which had been sold before three years had expired after the completion of the railroad should be exempted from pre-emption, the words 'or disposed of' were entirely superfluous. But the admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. * * * The phrase 'or disposed of' must therefore have some distinctive meaning beyond the word 'sold'."

In *Market Co.* vs. *Hoffman* 101 U. S. 115, 116 this Court said:

"We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's abridgment, Sect. 2, it was said that 'a Statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant'. This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

The truth of the rule thus shown is as self-evident as any axiom. Applying it to Sections 651 and 652 of the Revised Statutes quoted above, we arrive at the conclusion (to use the words of the Court in *Platt vs. Union Pac. R.*

R. Co., supra) that the phrase "during the same term" must therefore have had some distinctive meaning beyond what the language would have meant if such express words had not been used. That is to say, if the express words "during the same term" had not been inserted, the enactment would not have required the certificate to be made during the same term as the "final judgment or decree" to be appealed from, but might have been made at any time within which the appeal was allowed to be taken.

The provisions (§§ 651, 652, 693, 697, Rev. Stats.) for appeals upon certificates of division of opinion were repealed by the Act of March 3, 1891, now being considered (*U. S. v. Rider* 163, U. S. 139). And in place of the provisions so repealed, there was, at the same time enacted the provision of the Act of Mar. 3, 1891, (26 Stats. at large pp. 826-7) which gives appellate jurisdiction over this suit, and which is quoted in full on page 10 of this brief.

The Act of March 3, 1891 contains no such language as "during the same term," nor any language whatever to the same or any similar effect. It simply declares, "That appeals or writs of error may be taken * * * to the Supreme Court * * * in any case in which

the jurisdiction of the Court is in issue"; and that "In such cases the question of jurisdiction alone shall be certified to the Supreme Court for decision." And the only exception or limitation expressed is that contained in Sec. 1008 of the Revised Statutes, namely: that the appeal must be "within two years after the entry of such judgment, decree or order."

From the fact that in the Act of March 3, 1891, Congress has not said that the certificate of the question of jurisdiction shall be made "during the same term" from the fact that neither the words "during the same term" nor any equivalent expression is used in the Act, it follows, with the utmost certainty, that the Act of March 3, 1891 does not require the certificate of the question of jurisdiction to be made at the same term of Court as the judgment from which the appeal is taken.

To hold that under the Act of March 3, 1891, here being considered, the certificate of the question of jurisdiction is required to be made during the same term of the Circuit Court as the judgment appealed from, would be to hold that the words "during the same term" in Secs. 651 and 652 of the Revised Statuies, previously in force, were superflous words, used for no pur-

pose; and so to hold would be to violate the settled rule of law and of self-evident truth, that "a Legislature is presumed to have used no superfluous words"—a rule which "has been repeated innumerable times." (Platt vs. Union Pac. R. R. Co., 99 U. S. 58; Market Co. vs. Hoffman, 101, U. S. 115).

We submit that the considerations above stated, prove to an absolute demonstration, that under the Act of March 3, 1891, the certificate of the question of jurisdiction, is not required to be made at the same term as the judgment or decree from which the appeal is taken.

But there is still another established rule of Statutory construction that points to the same conclusion. The Act, though it states that "appeals or writs of error may be taken * * * to the Supreme Court in the following cases: In any case in which the jurisdiction of the Court is in issue," and though it states that "the question of jurisdiction alone shall be certified to the Supreme Court for decision," is expressed in plain and simple language, and contains no such exception as that an appeal cannot be taken if the certificate of jurisdiction is not made at

Omission of the Words "during the same term" from Judiciary Act of March 3, 1891.

In §§ 651, 652 Rev. Stats. Congress used the words " during the same term," in providing for the making of the Certificate. In the later, Judiciary Act of March 3, 1891, those words are omitted. Such use of the words in the former enactment (§§ 651, 652 Rev. Stats.) and their omission in the later Act, is proof that under the Judiciary Act of March 3, 1891, the certificate of the question of jurisdiction is not required to be made during the same term as the judgment from which the appeal has been taken.

The rule has been declared thus:

In *United States* vs. *Bashaw* I. C. C. A. 658, the Court said, per Shiras, J.:

> "It is a fundamental rule of construction [of a statute] that, if possible, force must be given to all the words used therein, and also, that, when a previous statute is amended by an alteration of the terms used therein, it is to be presumed that it was the intent to alter the meaning of the previous act in that particular. * * * The natural presumption is that the phraseology of the statute was changed in order to change its meaning."

In *Ellis* vs. *Paige*, 1 Pick (Mass.) 45, the Court ruled thus:

"It is a well settled rule, that when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled."

The same rule was emphatically declared and applied by the Court in each of the following decisions:

Buck vs. *Spafford*, 31 Me. 36.
Pingree vs. *Snell*, 42 Me. 55.
Poe vs. *State*, 85 Tenn. 499.
State vs. *Clark*, 57 Mo. 25.
Rich vs. *Keyser*, 54 Pa. St. 89.
Young vs. *Dake*, 5 N. Y. 466.
Lyon vs. *Smith*, 11 Barb. (N. Y.) 126.
Bloom vs. *Richards*, 2 Ohio St. 403.
Lehman vs. *Robinson*, 59 Ala. 240.
Mechanics etc. Bank vs. *Versailles W. Co.* 59 Conn. 353.
Rutland vs. *Mendon*, 1 Pick (Mass.) 155.
Dickenson vs. *Fletcher*, L. R. 9, C. P. 7.
Lawrence vs. *King*, L. R. 3, Q. B. 348.

In no case has an appeal been dismissed on the ground that the certificate of the question of jurisdiction, made after the term in which the judgment was entered, was not made within due time. Neither in *Colvin* vs. *Jacksonville*, 158 U. S. 456 nor in *The Bayonne*, 159 U. S. 687, was any such certificate of the question of jurisdiction before the Court; and in each of those cases, the language on the point is therefore *obiter* only.

the same term of the Circuit Court as the judgment appealed from is entered. And in *French* vs. *Spencer*, 21 How. 238, this Court said: "And, then, what is the rule? One that cannot be departed from without assuming, on the part of the judicial tribunals, legislative power. It is, that where the Legislature makes a plain provision, without making any exception, the Courts can make none." (Citing authorities) The same rule was declared, in *Yturbide* vs. *United States*, 22 Howard 290.

There is still another rule of construction, which leads to the same conclusion. In *United States* vs. *Arredondo*, 6 Peters, 725, it is said by this Court. "'*Expressio unius est exclusio alterius*,' is a universal maxim in the construction of Statutes." The Act of March 3, 1891, in connection with Sec. 1008 of the Revised Statutes, expresses as the only limitation upon the right of appeal, that an appeal must be taken within two years after the entry of the judgment. Under the rule of construction just stated, which this Court has declared to be "a universal maxim in the construction of Statutes," it follows that any other condition or

limitation is excluded, and therefore that it is not requisite to the jurisdiction on appeal, for the certificate of the question of jurisdiction, to have been made during the same term of Court as the making or entry of the judgment appealed from.

And there is still another rule of construction leading to the same conclusion: In *Lau Ow Bew* vs. *United States*, 144 U. S. 59, it is said by the Court: "Nothing is better settled than that Statutes should receive a sensible construction, such as will effectuate the Legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion." (Citing authorities.)

The Act of Congress gives the party against whom a judgment of a Circuit Court is made, the right to take an appeal therefrom, upon the question of the jurisdiction of the Court, at any time within two years after the entry of such judgment. The law nowhere provides for any notice to be given to the aggrieved party, of the fact that judgment of the Circuit Court has been entered or given against him. And still further, such judgment may have been given on the very last day of the term of Court. If, then, it were

to be held that no appeal could be taken, unless the question of the jurisdiction of the Circuit Court should be certified to the Supreme Court during the same term as the judgment to be appealed from is entered, the right of appeal would frequently be lost by the aggrieved party, without any fault on his part, and this would be an unjust and absurd conclusion.

Still further:—The certifying of the question of jurisdiction, if done at all, is of value only in case of an appeal to the Supreme Court. Now the Statute expressly gives the aggrieved party a right to an appeal within two years from the entry of the judgment against him. The language of the Revised Statutes (Secs. 692, 695, 696) also speaks of the *allowance* of an appeal, the language being: "An appeal shall be allowed," etc., and the settled practice is for a Judge of the Circuit Court to make an order allowing an appeal. Before a Circuit Judge Judge can be required to make an order allowing an appeal, he must be satisfied that the case is one in which an appeal is authorized. Why should a Circuit Judge be limited in the certifying of the question of jurisdiction, to the same

term of Court as the final judgment appealed from, any more than in making the order allowing the appeal? Besides, since the aggrieved party is given a right to take his appeal within two years from the entry of the judgment, and since the procuring of a certificate of the question of jurisdiction, is solely a part of the procedure of appeal, he can not, in reason, be required to obtain the making of that certificate, during the same term as the judgment appealed from is entered, any more than he can be required to take any other step in the appeal at that time.

No Authority to the Contrary.

It remains to be shown that there is no decision which is binding upon the Court, as authority, against the conclusion above stated. In *Colvin* vs. *Jacksonville*, 158 U. S. 457, it is stated that the certificate must be granted during the term at which the judgment or decree is entered. In that case, however, the appeal was not dismissed, and the statement can therefore, hardly rank as a direct decision. The statement is there expressly founded upon Secs. 650, 651, 652, 693, and 697 of the Revised Statutes,

and upon two other authorities. But the fact that the express words "during the same term" were used by Congress in the Sections of the Revised Statutes referred to, and the established rule of law that if those express words had not been used the meaning would have been different,—all this was overlooked and passed *sub silentio*. The statement in *Colvin* vs. *Jacksonville*, that "the certificate must be granted during the term in which the judgment or decree is entered," is therefore not an authority binding upon the Court.

In *United States* vs. *More*, 3 Cranch 172, Counsel urged a certain prior decision of the Court in support of the point of jurisdiction, and the Court replied, by Chief Justice Marshall:

"No question was made in that case, as to the jurisdiction; it passed *sub silentio*, and the Court does not consider itself as bound by that case."

This language was quoted and approved by the Court in *United States* vs. *Sanges*, 144 U. S. 319.

And in *Cross* vs. *Burke*, 146 U. S. 87, the Court refused to follow a prior decision, and said.

"But the question of jurisdiction does not appear to have been contested in *Wales vs. Whitney*, and where this is so, the Court

does not consider itself bound by the view expressed. U. S. vs. Sanges, 144 U. S. 310, 317; U. S. vs. More, 3 Cranch 159, 172."

The same rule was declared and acted upon by the Supreme Court of California, in *Duff* vs. *Fisher*, 15 Cal. 382 and the Court, speaking by Chief Justice Field, said:

"A single decision, made without notice of the Statute, and which in fact sets the Statute aside, can not be invoked as authority obedience to which we are bound to yield on the principle of *stare decisis*."

The dictum in *Colvin* vs. *Jacksonville*, is also there said to be made "in view of the general rule as to the inability of the Court to deal with matters of this sort after the expiration of the term"; and Hickman vs. Fort Scott, 141, U. S. 415, and Morse vs. Anderson, 150 U. S. 156, are cited.

But the only ruling made in Hickman vs. Fort Scott, 141 U. S. 415, was, that a Circuit Court can not change its judgment after the term at which it was entered, where no ground of mistake or inadvertence exists. And in Morse vs. Anderson, 150 U. S. 156, the only ruling made, was, that the allowance of a bill of exceptions, was not seasonable, if made after

the expiration of the time allowed therefor by the order of the Circuit Court. We, therefore, submit that the Court is not bound by the view expressed in *Colvin* vs. *Jacksonville* 158 U. S. and repeated in *The Bayonne* 159 U. S. In neither of these cases was any question decided, which would tend to show the existence, in the Act of March 3, 1891, of any implied provision that the certificate of the question of jurisdiction must be made at the same term as the judgment appealed from. Under the law as established by the decisions of this Court, (*United States* vs. *More* 3 Cranch 172; *United States* vs. *Sanges* 144 U. S 319; *Cross Burke* 127 U. S. 87) the statement in *Colvin* vs. *Jacksonville* is therefore not binding as authority. In *The Bayonne* 159 U. S. 692, the ruling is based exclusively on the statement in *Colvin* vs. *Jacksonville* and also inadvertently overlooks the error of that statement.

For the reasons, and upon the authorities above stated, and by virtue of the established rules of statutory construction above mentioned, we submit that it is certain, to an absolute demonstration, that under the Act of Congress of March 3, 1891, prescribing the jurisdiction

on appeal in this suit, and giving the right of appeal, the certificate of the question of jurisdiction of the Circuit Court, as well as the order allowing the appeal, may properly be made at any time within the period of two years prescribed as the period within which the appeal may be taken.

In the case here, as already mentioned above, under the statement or the facts, the petition on appeal was filed in the Circuit Court within six months after the entry of the judgment from which the appeal has been taken. That petition expressly states that the appeal is taken upon the sole ground that the Circuit Court had no jurisdiction of the suit; and expressly asks that the question of jurisdiction be certified to the Supreme Court. And, shortly afterwards, and at the same term of Court, a formal certificate of the question of jurisdiction was made. We submit that it was made as prescribed by the Act of Congress.

2.

The Order Allowing the Appeal Is Itself a Sufficient Certificate of the Question of Jurisdiction.

The petition for the appeal, filed Dec. 16, 1896, states in express words that the appeal is taken and that the order allowing the appeal is prayed "for the reasons specified in the assignment of errors which is filed herewith." The assignment of errors so referred to and filed with the petition for an appeal consists solely of specifications that the Circuit Court was without jurisdiction of the suit. The petition also says expressly that the appellants "each pray that *this appeal* be allowed, and *that the question of the jurisdiction of the Court* * * * duly authenticated, be sent to the Supreme Court of the United States." The order allowing the appeal expressly states that "the foregoing appeal be and the same is allowed *as prayed for*."

This Court has decided that such an order allowing an appeal is itself a sufficient certificate of the question of jurisdiction. The decision referred to is:

Shields vs. *Coleman*, 157 U. S. 176.

3.

A Proper and Sufficient Certificate of the Question of Jurisdiction Was Made Before Expiration of the Term at Which the Judgment Appealed From was Entered.

It has been expressly decided that any act of the Circuit Court or Circuit Judge stating that the "jurisdiction of the Court is in issue" (to quote the language of the Act of Congress of March 3, 1891) is a sufficient certificate of the question of such jurisdiction. This is upon the established principle that the law regards substance rather than form. The decisions here referred to are:

> *Shields* vs. *Coleman*, 157 U. S., 176; and *In re Lehigh Min. & Mfg. Co.*, 156 U. S., 327.

In the opinion of Judge McKenna, the Circuit Judge filed on July 10, 1893, in holding the plea to the jurisdiction sufficient as a defense, and again in the opinion of the same Judge filed on July 23, 1894, in overruling the plea to the jurisdiction and the two motions, made by each of these appellants respectively, to dismiss the suit for lack of jurisdiction—in each of these

opinions, and particularly in the latter, there is a complete certificate of the question of jurisdiction. And the Judge who rendered the final decree (Judge Hawley), then (at the very time he rendered the final decree) filed a written opinion or statement, which expressly referred to the latter of those two opinions of Judge McKenna,—the one which is the more complete as a certificate of the question of jurisdiction—and in substance reaffirmed that opinion.

The opinion of Judge McKenna here referred to, filed July 23, 1894, is as full and specific a certificate of the question of jurisdiction, as the one held sufficient in

Colvin vs. *Jacksonville*, 158 U. S., 458.

There can be no question that each of the opinions filed by Judge McKenna, and here referred to, and the written opinion of Judge Hawley expressly referring to and in effect reaffirming the second of them, are a complete and sufficient certificate of the question of jurisdiction. Such is the ruling in:

In re Lehigh Min. & Mfg. Co., 156 U. S., 327.

Shields vs. *Coleman*, 157 U. S., 176.

4.

The Case Is One Where No Certificate of the Question of Jurisdiction Is Requisite.

In *Carey* vs. *Houston* 150 U. S. 179, the Supreme Court said:

"We do not now say that the absence of a formal certificate would be fatal, but it is required by the Statute, *and its absence might have controlling weight where the alleged issue is not distinctly defined.*"

In that case there was no certificate of the question of jurisdiction, but it was not held that the absence of the certificate was fatal to the appeal; the appeal was dismissed on the ground that the jurisdiction of the Circuit Court had not been in issue in the suit.

In *Interior Construction Co.* vs. *Gibney* 160 U. S. 219, there was no certificate of the question of jurisdiction. And the Court expressly held that no such certificate was necessary, but took jurisdiction of the appeal and reversed the judgment appealed from. In that case the Court said:

"The record shows that the only matter tried and decided in the Circuit Court, was a demurrer to the plea to the jurisdiction;

and the petition upon which the writ of error was allowed, asked only for the review of the judgment that the Court had no jurisdiction of the action. The question of jurisdiction alone is thus sufficiently certified to this Court, as required by the Act of March 3, 1891, c. 517, Sec. 5, 26 Stat. 828; *In re Lehigh Co.* 156 U. S. 322; *Shields* vs. *Coleman*, 157 U. S. 168."

The principle of the two decisions last cited, manifestly is that the law does not require any vain or superfluous or idle act, and therefore, that where the record discloses the question of the jurisdiction of the Circuit Court, and the fact that such jurisdiction was in issue, as clearly as it could be shown by any certificate,—that in any such case the bare allowance of an appeal taken upon the sole question of jurisdiction, is sufficient, and no formal certificate of the question of jurisdiction is requisite. It is the principle of law, declared in the following maxims: *Lex est dictamen rationis. Lex semper intendit quad convenit rationi. Lex rejicit superflua. Lex nil facit frustra, nil jubet frustra.*

The same principle was followed in *Mattingly* vs. *N. W. Virginia Railroad*, 158 U. S., 57. There the Statute gave the right to an appeal from the Circuit Court in cases "in which there shall have been a question involving the juris-

diction of the Court," and said also that "the Supreme Court shall not review any question raised upon the record except such question of jurisdiction." There was no certificate of the question of jurisdiction, nor had any question of jurisdiction been raised in the Circuit Court. But the Supreme Court took jurisdiction of the appeal and reversed the judgment appealed from and said:

"Although it does not appear that the question of jurisdiction was raised in the Court below, by any plea or motion, yet, as the record failed to affirmatively show jurisdiction, this Court must take notice of the defect. Chapman vs. Barney, 129 U. S., 677; Deny vs. Pironi, 141 U. S., 121; Roberts vs. Lewis, 144 U. S., 653; Northern Pac. R. R. Co. vs. Walker, 158 U. S., 391."

The principle of these decisions, and the rule declared and enforced in each of them, applies to the case here. The bill filed in the Circuit Court, shows affirmatively that the Court was without jurisdiction of the suit. It is the settled law that in order to ascertain whether the bill or complaint alleges a controversy between citizens of different States, and therefore, a case for the jurisdiction of the Circuit Court, the Court must disregard the manner in which the names of the parties are arranged in the title of the bill, and treat them as plaintiffs or defendants, according

to their true position in the suit. And that, when so arranged, if citizens of the same State appear as opposing parties, the Circuit Court is without jurisdiction. In the case here, the bill shows that the trustees, Stanly and Purington, though named in the title to the bill as defendants, were in fact, plaintiffs, and necessary parties to the suit. The bill states that they were, and are, citizens of California, and of the same State as the defendants in the suit. The bill, therefore, shows that the Court was without jurisdiction of the suit; and, of this fact the Court was bound to take notice of its own motion, and of its own motion dismiss the suit for want of jurisdiction. And of such a defect the Supreme Court will of its own motion take cognizance and order the suit dismissed.

Blacklock vs. Small, 127 U. S. 104.

Covert vs. Waldron, 33 Fed. Rep., 312.

Pac. R. R. Co. vs. Ketchum, 101 U. S. (11 Otto), 295.

Rich vs. Bray, 37 Fed. Rep. 273.

Barry vs. Mo. K. & T. Ry. Co., 27 Fed. Rep., 2.

Bland vs. Fleeman, 29 Fed. Rep., 669.

Peper vs. Fordyce, 119 U. S. 469.

Rice vs. Houston, 80 U. S. (13 Wall), 66.

Bible Society vs. Price, 110 U. S. 61.

R. R. Coal Co. vs. Blatchford, 78 U. S. (11 Wall) 172.

Gardner vs. Brown, 88 U. S. (21 Wall.), 36.

Blake vs. McKim, 103 U. S. (13 Otto), 336.

Ribon vs. R. R. Co., 83 U. S. (16 Wall.), 447.

McRea vs. Branch Bank of Ala., 19 How. 376.

O'Hara vs. McConnell, 93 U. S. 150.

Mattingly vs. N. W. Virginia R. R., 158 U. S. 57.

Chapman vs. Barney, 129 U. S. 677.

The record also discloses the fact that the objection to the jurisdiction of the Circuit Court was by these appellants litigated from the very outset. It was litigated by demurrers to the bill, by plea, and by motions to dismiss the suit for want of jurisdiction, and the petition on appeal expressly states that the appeal is taken upon the sole ground that the Circuit Court was without jurisdiction of the suit, and the order allowing the appeal expressly states that it is allowed only on that ground. Even if we were to lay

out of account the two opinions filed in writing by Judge McKenna, each of which certifies the question of jurisdiction, and the opinion of Judge Hawley, filed in writing, when rendering the final judgment, in which he referred to and substantially re-affirmed the latter of the two opinions of Judge McKenna; and if we were to lay out of account also the formal certificate of the question of jurisdiction, still, the record would present to this Court on appeal the question of the jurisdiction of the Circuit Court, and the fact that the Circuit Court was without jurisdiction of the suit, as clearly, as any certificate could do. And, as above mentioned, the want of jurisdiction of the suit by the Circuit Court, was a matter of which that Court was bound to take cognizance of its own motion, even though not called to its attention by any party; and of such a defect of jurisdiction, the Supreme Court also has invariably held itself bound to take cognizance of its own motion even when its attention to the want of jurisdiction is not called to its attention in any manner whatever.

(Authorities last above cited).

Also

Cameron vs. Hodges, 127 U. S. 325.

Bible Society vs. Price, 110 U. S. 61.

R. R. Coal Co. vs. Blatchford, 78 U. S. (11 Wall) 172.

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Cameron vs. Hodges, 127 U. S. 325.

Williams vs. Nattawa, 104 U. S. (14 Otto), 352.

Farmington Village vs. Pillsbury, 114 U. S. 138-146.

Inhabitants, etc., vs. Stebbins, 109 U. S. 341.

Detroit vs. Dean, 106 U. S. (16 Otto), 537.

Cashman vs. Amador Co., 118 U. S. 58.

Morris vs. Gilmer, 129 U. S. 327.

Vannerson vs. Leverett, 31 Fed. Rep. 376.

In *Cameron* vs. *Hodges*, 127 U. S. 325, the Supreme Court said:

"This Court has uniformly acted upon the principle that in order to protect itself from collusive agreements between parties who wish to litigate their controversies in the Federal Courts, it would, on its own motion, take the objection of the want of jurisdiction in the Circuit Court, especially as regards citizenship. *Hilton* vs. *Dickinson*, 108 U. S. 165; *Morgan's Executor* vs. *Gay*, 19 Wall. 81."

Indeed, is it not in any case a superfluous and idle act to certify that of which the Court has invariably taken notice of its own motion, even though not mentioned to it in any way? And would not the formal certificate be strikingly superfluous in so clear a case as an attempt to

feign a controversy between citizens of different States, and thus a jurisdiction in the Federal Courts, by merely naming two of the necessary plaintiffs among the defendants in the title to the bill?

II.

The First and the Second of the Alleged Grounds for the Motion.

We do not think that either the first or the second of the alleged grounds of the motion justifies any serious consideration. The Statute nowhere requires that the certificate of the question of jurisdiction shall be made by any particular judge, and, besides, in the case here, as already shown, the question of the jurisdiction of the Circuit Court has been duly and sufficiently certified by each of the Judges respectively, before whom the suit came at different times in the Circuit Court. The certificate of the question of jurisdiction was made by Judge McKenna (we refer to his opinion filed in writing July 23, 1894), at the same term of Court as his order overruling the plea to the jurisdiction; but it was not permissible to take the appeal until after the final judgment of June,

1896, (McLish vs. Roff 141 U. S. 661). That certificate (the opinion of Judge McKenna) was, as already shown, referred to and substantially reaffirmed by Judge Hawley in rendering the final judgment in June, 1896.

It is respectfully submitted that the motion to dismiss the appeal should be denied.

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